

I N D E X

	PAGE
Bill of Complaint	1
Order to Show Cause.....	16
Affidavit of Louis V. Kelly.....	17
Affidavit of Jack A. Kelly.....	23
Affidavit of Francis J. Mulholland.....	28
Affidavit of Ira Wood.....	30
Affidavit of Joseph Benson.....	31
Affidavit of William Gobright.....	32
Affidavit of James McPhillips.....	33
Affidavit of Samuel Weinberg.....	34
Affidavit of Alfred Hensel.....	35
Order Dismissing Order to Show Cause.....	36
Answer and Counter-Claim	38
Reply and Answer to Counter-Claim.....	45
Order of Reference	47
Order of Designation	49

	PAGE
COMPLAINANT'S TESTIMONY:	
Edwin R. Cox, Jr.—Direct.....	51
Cross	64
Re-direct	89
Re-cross	94
DEFENDANTS' TESTIMONY:	
Louis Kelly—Direct	98
Cross	129
Re-direct	162
Re-cross	163
Recalled—Direct	201
Recalled—Cross	206
Jack Kelly—Direct	164
Cross	172
Scott H. Adams—Direct	184
Recalled—Direct	186
Ira Wood—Direct	187
Cross	191
Woodruff D. Hand—Direct	194
Alfred Hentzel—Direct	196
Cross	198
Re-direct	198
Francis J. Mulholland—Direct	199
COMPLAINANT'S REBUTTAL TESTIMONY:	
Edwin R. Cox, Jr.—Direct.....	207
Cross	209
Miss Anna Howard—Direct	213
Cross	214

	PAGE
Thomas H. McCool—Direct	218
Cross	227
 COMPLAINANT'S EXHIBITS:	
C1, Photostat	233
C3, Agreement between Atlantic Refining Co. and Louis and Jack Kelly, Dated Feb. 2, 1928	235
C4, Letter, Kelly Bros. to Atlantic Refining Co., Dated Feb. 17, 1928.....	245
C5, Invoice, Dated 3/9/1928.....	246
C6, Invoice, Dated 2/21/1928.....	247
 DEFENDANTS' EXHIBITS:	
D1, Letter, Atlantic Refining Co. to Kelly Bros., Dated July 30, 1928.....	249
D2, Agreement between Atlantic Refining Co. and Paul and Jack Kelly, Dated Feb. 2, 1928	250
D3, Letter, Endicott & Endicott to Louis Kelly, Dated Dec. 26, 1928.....	259
D4, Credit Memorandum	260
Conclusions	261
Final Decree	266
Order Supplementing Final Decree.....	268

	PAGE
Notice of Appeal	270, 272
Petition of Appeal	274
Answer to Petition of Appeal.....	277

BILL OF COMPLAINT.

(Filed Jan. 10, 1929.)

IN CHANCERY OF NEW JERSEY.

*To his Honor, Edwin Robert Walker, Chancellor of
the State of New Jersey:*

10

The complainants, Atlantic Refining Company, a corporation of the Commonwealth of Pennsylvania, doing business in the State of New Jersey, with offices at Atlantic City in the County of Atlantic, State of New Jersey, respectfully shows:

1. The complainant is engaged in the business of selling and distributing gasoline and motor fuels, known as Atlantic Gasoline and Atlantic Motor Oils.

20

2. On February 2, 1928, the complainant entered into a written agreement with Louis Kelly and Jack Kelly, the defendants herein who are residents of the City of Margate City, in the said county and said State, and are engaged as partners in the business of retailing gasoline and motor fuels. The said agreement covers the premises located at the northeast corner of Ventnor and Delavan Avenue, in the said City of Margate City, and occupied by them as tenants, by lease with John Dear the owner of the said premises. The terms of the said lease are unknown to this complainant.

30

3. By the terms of the said contract complainant agreed to erect on the above described premises the following equipment:

Four (4) 5-Gal. pumps.
 (Four (4) T-71 Meters.
 Four (4) T-166 Foot Valves.
 Four (4) Fitter Globes.
 Four (4) Hoses & Nozzles.
 One (1) Internally illuminated Sign.
 Four (4) 20 bbl. 12 Gauge tanks.
 Four (4) Man-Holt Fill caps.
 Four (4) Gauge Rods & Tables.
 10 Four (4) Motor Oil Outfits.
 Two (2) Lamp Standards.

Also the necessary underground piping for the above system excavating refill and the cement drive-way necessary for the passage of motor vehicles to the said equipment.

✓ at an agreed cost of two thousand eight hundred and twenty (\$2,820.00) dollars.

4. In consideration of Atlantic Refining Company
 20 erecting such equipment the said Louis Kelly and
 Jack Kelly agreed that the said premises should be
 used only for the sale of Atlantic Gasoline and At-
 lantic Motor Oil for a period of five (5) years end-
 ing February 2, 1933, and thereafter for a further
 period of one (1) year unless either party shall ter-
 minate same by written notice sixty (60) days prior
 to the termination of said first mentioned period. A
 copy of the said written agreement is attached here-
 to and made a part hereof.

30

5. Pursuant to the terms of said contract the At-
 lantic Refining Company erected the equipment con-
 tracted for and did everything required by it to be
 done by the terms of the said contract.

6. Thereafter and subsequent to the work done
 under the said agreement by the Atlantic Refining

Company, complainant, the defendants, Louis Kelly and Jack Kelly took possession of the premises immediately adjoining the above-described premises under a lease with the said John Dear who is also the owner of the above-described premises. The terms of the said lease are unknown to your complainant. The said adjoining premises being more particularly described as follows: Situate in Margate City, Atlantic County, New Jersey.

BEGINNING at a point in the Northerly line of Ventnor Avenue, forty-two (42) feet from the Northeastern intersection of Delavan and Ventnor Avenues and extending thence; (1) Easterly in the northerly line of Ventnor Avenue, forty-one (41) feet, thence; (2) Northwardly parallel with Delavan Avenue seventy-five (75) feet, thence; (3) Westwardly parallel with Ventnor Avenue forty-one (41) feet, thence; (4) Southwardly parallel with Delavan Avenue seventy-five (75) feet to the place of beginning. 10 20

7. The said defendants, Louis Kelly and Jack Kelly, thereafter erected or had erected on their behalf, on the said adjoining premises and immediately within the boundary line of the said adjoining premises and immediately adjacent to the first described premises, a gasoline pump of the same general nature as that erected by your complainant.

8. The northeast corner of Ventnor and Delavan Avenues and more particularly described as follows: Situate in Margate City, Atlantic County, New Jersey, 30

BEGINNING at a point being the Northeast-erly intersection of Ventnor and Delavan Avenues and extending thence; (1) Eastwardly in

the Northerly line of Ventnor Avenue, forty-two (42) feet, thence; (2) Northwardly parallel with Delavan Avenue, seventy-five (75) feet, thence; (3) Westwardly parallel with Ventnor Avenue, forty-two (42) feet, thence; (4) Southwardly in the easterly line of Delavan Avenue, seventy-five (75) feet to the place of beginning.

- 10 9. The said pump bears the advertisement of Tidewater Oil Company and distributes therefrom a motor fuel known as Tydol which is of the same general nature as the motor fuel of the Atlantic Refining Company. Tydol is in active competition with complainant's gasoline and oil products.

20 10. The said defendants, Louis Kelly and Jack Kelly, or one of them, have frequently violated, and continue to violate the terms of the said written agreement by selling Tydol and other gasoline and oil products on or from the said northeast corner of Ventnor and Delavan Avenues, in Margate City, New Jersey. In order to use the said Tidewater pump, motor vehicles, into which the Tydol motor fuel is pumped, enter and park upon the premises at the northeast corner of Ventnor and Delavan Avenues and use the cement drive-way erected there by complainant under the said agreement.

- 30 Complainant thereby suffers an irreparable injury but is without adequate relief in the courts of law and therefore prays:

1. That Louis Kelly and Jack Kelly who are the defendants in this suit may answer this bill of complaint and each allegation made therein.

2. That the said Louis Kelly and Jack Kelly and their agents, servants and employes may be enjoined from using the said premises located at Ventnor and Delavan Avenues to sell or distribute thereon, or from selling or distributing therefrom, any gasoline or motor fuel manufactured or sold by any one other than the Atlantic Refining Company.

3. That a writ of subpoena may issue commanding said Louis Kelly and Jack Kelly, the defendants 10 in this suit, to answer this bill of complaint and abide by such decree as this Court may make in the premises.

ENDICOTT & ENDICOTT,
*Solicitors for and of Counsel
with Complainant.*

STATE OF NEW JERSEY, }
COUNTY OF ATLANTIC, } ss.

20

EDWIN R. COX, JR., of full age, being duly sworn, according to law, upon his oath deposes and says:

I am the district manager in charge of the territory covering Atlantic County, New Jersey, for the Atlantic Refining Company.

On the second day of February, A. D. 1928, I negotiated a contract between Louis Kelly and Jack Kelly, trading as partners, of the City of Margate 30 City, County of Atlantic, State of New Jersey, with the Atlantic Refining Company covering the premises at the northeast corner of Ventnor and Delavan Avenues, Margate City, New Jersey. Said contract was reduced to writing, and a true copy thereof is attached to the foregoing bill.

The Atlantic Refining Company's chief enterprise in Atlantic County is the sale and distribution of Atlantic Gasoline and Atlantic Motor Oils, as will more fully appear by the said contract.

The Atlantic Refining Company erected on the premises at the northeast corner of Ventnor and Delavan Avenues, certain pumping equipment, meter units, underground tanks, internally illuminated signs, motor oil outfits as well as cement work
10 for the proper passage of automobiles to the pumps, at an agreed cost of two thousand eight hundred and twenty (\$2,820.00) dollars.

As an inducement for the Atlantic Refining Company to erect such equipment, the said Louis Kelly and Jack Kelly agreed that the said location should be used only for the sale of Atlantic Gasoline and Atlantic Motor oil.

Pursuant to the terms of the said contract Atlantic Refining Company erected the equipment contracted
20 for and did everything required by it to be done under the terms of the contract.

The said Louis Kelly and Jack Kelly, however, have failed to fulfill the terms of the said contract. They have leased the premises immediately adjoining the above described premises from one John Dear who is also the owner of the above described premises and have had erected just within the boundary line of the adjacent premises a Tidewater Gasoline Company pump from which is sold Tydol
30 Motor Fuel, which product is of the same general nature as the product of the Atlantic Refining Company, and are in active competition therewith.

The said Louis Kelly and Jack Kelly distribute the Tydol products from the Tidewater Pump to motor vehicles that use and are parked on the first described premises and upon the cement pavement erected by the Atlantic Refining Company, and to be

used under the terms of the agreement solely in the sale and distribution of the Atlantic Refining Company products.

EDWIN R. COX, JR.

Sworn and subscribed to before me this tenth day of January, 1929.

(Seal)

REGINA BARKAN,
Notary Public of New Jersey.

10

ATLANTIC REFINING COMPANY
AGREEMENT

THIS AGREEMENT made the 2nd day of February, 1928, between The Atlantic Refining Company, a corporation of the Commonwealth of Pennsylvania, party of the first part, and Louis and Jack Kelly of Margate City, County of Atlantic, State of New Jersey, party of the second part;

20

WHEREAS, the party of the second part is the Lessee of a certain piece of land situated at Ventnor & Delavan Streets in the City of Margate, County of Atlantic, State of New Jersey by a lease with dated the

day of _____, 19____, and recorded in the office for recording of deed in and for

in _____ book, _____ page

and etc., more definitely described as follows:

30

and is desirous of having the party of the first part enter upon said land for the purpose of making certain improvements as well as installing thereon a system for retailing gasoline, motor fuels, motor oils and greases to the general public and loan same to the party of the second part;

NOW THEREFORE THIS AGREEMENT WITNESSETH:

That the party of the first part, in consideration of the party of the second part purchasing all gasoline, motor fuels, motor oils and greases handled and dispensed from said piece of land first above described, solely from the party of the first part, at the party of the first part's following specified prices, prevailing in the town or city in which said land is located:

10 All gasoline and motor fuels at tank wagon price to dealers,

All motor oils and greases as per schedule of prices to dealers;
 hereby agrees to furnish and lend, to the party of the second part, for a period beginning on the day first above mentioned and continuing until the Second day of February, 1933, a complete system for re-tailing gasoline, motor fuels, motor oils, and greases to the general public, the said system, for the purpose of this agreement, to include the following:

- 20 Four (4) 5-Gal. pumps.
 Four (4) T-71 Meters
 Four (4) T-166 Foot Valves
 Four (4) Fitter Globes
 Four (4) Hoses & Nozzles
 One (1) Internally Illuminated Sign.
 Four (4) 20 bbl. 12 Gauge tanks.
 Four (4) Man-Holt Fill caps.
 30 Four (4) Gauge rods & Tables
 Four (4) Motor Oil Outfits
 Two (2) Lamp Standards

Also the necessary underground piping for the above system excavating refill and cement work. In consideration of the investment required, it is agreed that the above location shall be used

only for the sale of Atlantic Gasoline and Atlantic Motor Oils.

The party of the first part further agrees to install said system and make the following improvements at its own cost and expense:

Installing Cinder Driveway

Nothing herein contained shall be construed as preventing the party of the second part from selling or otherwise dealing in automobile accessories and supplies, except petroleum products, which said automobile accessories, except as aforesaid, may be purchased from any person or corporation. 10

It is agreed that the system shall at all time remain the property of the party of the first part; and that by reason of the investment made by the party of the first part in the installation of the system and the making of the improvements, it shall be operated and used along with the said piece of land first above described, by the party of the second part, during the continuance of this agreement or any extension thereof, only for the purpose of handling and dispensing gasoline, motor fuels, motor oils and greases purchased from the party of the first part; and that, at the expiration of this Agreement or any extension or prior termination thereof, said system shall be turned over to the party of the first part in good order and condition. 20

It is further agreed that if the party of the second part shall at any time cease to purchase all gasoline, motor fuels, motor oils and greases handled and dispensed through the said system from the party of the first part; or fail to pay promptly, on demand by the party of the first part, for all gasoline, motor fuels, motor oils and greases purchased in accordance with the terms of payment as specified from 30

time to time in writing by the party of the first part; or attempt to or actually handle or dispense from said piece of land first above described, any gasoline, motor fuels, motor oils or greases purchased from any party other than the party of the first part; or fail to operate said system daily in a regular and businesslike manner; or fail to purchase at least 100,000 gallons of gasoline or motor fuels and 2,000 gallons of motor oils yearly from said party of the first part; or use the said system for the handling of gasoline, motor fuels, motor oils and greases purchased from any other party; or for any purpose other than the handling of gasoline, motor fuels, motor oils and greases purchased from the party of the first part; or cease to purchase gasoline, motor fuels, motor oils and greases from the party of the first part; or attempt to add to, move or remove the said system without the written permission of the party of the first part; or if any attachment, execution, distress for rent, or like process shall be issued against the party of the second part; or in the event of the party of the second part becoming financially embarrassed or involved, insolvent, or involved in bankruptcy, or in any other way the said party of the second part shall fail to keep or perform the terms and conditions of this Agreement; then, and in such case, the said party of the second part shall be construed and is hereby declared to be in default hereunder, and the party of the first part, may, immediately or thereafter, at its option, without notice to the party of the second part, take immediate possession of the said system and remove the same without let or hindrance, with or without process of law, without the party of the first part or its agent or agents, or the officers of the law, becoming in any way liable for trespass, claims for injury or damage

in the removal of the said system, and charge the party of the second part with the sum of Nineteen Hundred, Twenty Dollars (\$1,920.00), which its is agreed, is the fair and reasonable cost of the installation and removal of the system and the cost of the improvements mentioned hereunder, and thereupon said sum charged shall immediately become due and payable by the party of the second part; or allow said system to remain and charge the party of the second part, with the sum of Twenty Eight Hundred, Twenty Dollars (\$2,820.00) the agreed value of the system and improvements, and thereupon said sum charged shall immediately become due and payable to the party of the second part, and upon the payment of said sum title to said system is to pass from the party of the first part to the party of the second part. 10

The party of the second part hereby waives and relinquishes any and all claims against the party of the first part, and does hereby exonerate, discharge and agree to protect and save harmless and indemnified said party of the first part, and its assignees from any and all liability for damage which may be suffered by the party of the second part their agents, servants, or by any other person or persons on or about said premises, by reason of leakage, fire, explosion, or other casualty occurring through any imperfection in, injury or damage to, or by reason of the operation of the said system or premises, or from any cause whatsoever. 20 30

The party of the second part covenants and agrees, that, at the time of the signing of this agreement, the property or premises are free of all liens and encumbrances, and that after the execution of this agreement he shall not encumber the property or permit the property to become encumbered in

any way, without the written consent of the party of the first part.

10 The party of the second party hereby agrees to make application for and secure necessary permits from the respective City and State authorities for the making of said improvements and the installing of said equipment, and for the storing handling and dispensing of petroleum products on and from said piece of land first above described, Should any of said permits be refused or unduly delayed by the City and/or State authorities, then the party of the first part may at its election forthwith cancel this agreement.

20 The party of the second part shall pay for all water, gas and electricity used on the premises, keep the premises and the improvements on the premises in a neat condition and not misuse or permit to be misused any of the mechanical equipment placed upon the premises by the party of the first part.

This agreement shall continue in full force and effect for a further period of one year from the end of the period hereinbefore stipulated, unless either party shall give written notice to the contrary, to the order party, sixty days prior to the termination of said first mentioned period; and after termination of said second period this agreement shall continue until termination by either party, by the giving of ninety days' written notice of such termination.

30 This agreement is not assignable without the written consent of the party of the first part.

All rights, remedies and liabilities herein given to, or imposed upon either of the parties hereto, shall extent to the respective heirs, executors, administrators, successors, and assigns of such party.

IN WITNESS WHEREOF the parties have here-

unto set their hands the day and year first above written.

THE ATLANTIC REFINING COMPANY,
BY Harold B. Stone
District Manager
X Louis & Jack Kelly
Louis Kelly

WITNESSES:
Ernest L. McKenna
E. R. Cox, Jr.

10

STATE OF NEW JERSEY }
COUNTY OF CAPE MAY } SS

BE IT REMEMBERED, That on this second day of May in the year of Our Lord One Thousand nine hundred and twenty-eight, before me, SCOTT H. ADAMS, Notary Public personally appeared LOUIS KELLY and JACK KELLY, the Party of the Second Part in the foregoing instrument, who, I am satisfied are the parties mentioned in the above agreement, and I having first made known to them the contents thereof, they and each of them acknowledged that they signed, sealed and delivered the same as their and each of their voluntary acts and deeds, all of which is hereby certified.

20

SCOTT H. ADAMS 30

My commission expires April 16, 1931

STATE OF PENNSYLVANIA }
 COUNTY OF PHILADELPHIA } SS.

BE IT REMEMBERED, that on this 2nd day of April, in the year of Our Lord one thousand nine hundred and twenty-eight, before me, the subscriber, a Foreign Commissioner of Deeds for New Jersey, personally appeared HAROLD B. STONE, Manager of the New Jersey district of the above mentioned THE ATLANTIC REFINING COMPANY, who, I am satisfied, signed the above agreement for the Party of the First Part, and I having first made known to him the contents thereof, he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed and the voluntary act and deed of the said THE ATLANTIC REFINING COMPANY, all of which is hereby certified.

20

DANIEL C. THOMPSON
 A foreign Commissioner of Deeds
 for New Jersey in Pennsylvania,
 Commission Expires March 15, 1931.

OWNER'S RELEASE

The undersigned, owner of the land mentioned under this Agreement, at and upon which the herein mentioned system is to be installed and improvements are to be made, hereby acknowledges to have received notice of the within Agreement, and assents to the terms and conditions thereof, and in consideration of the sum of One Dollar (\$1.00), well and truly paid by THE ATLANTIC REFINING COMPANY, the receipt of which sum is hereby acknowl-

edged, and the furnishing, installing, and lending of the said system by the said Company to the party of the second part, and the making of said improvements, hereby waives and releases all right to hold or levy upon said system, or any and all parts thereof, belonging to said THE ATLANTIC REFINING COMPANY, for rent or otherwise, and hereby consents that the said system or any and all parts thereof, may be removed from said land by THE ATLANTIC REFINING COMPANY, its successors or 10 assigns, or their representatives at any time without notice or liability for any consequential or other damages to the undersigned other than to replace any physical property on said premises actually damaged in the removal of said system.

The undersigned further agrees that upon default of the party of the second part under the terms of the lease hereinbefore referred to, the undersigned will give to The Atlantic Refining Company forth- 20 with written notice of said default, and if, by reason of said default, the undersigned has the right to terminate said lease and repossess himself of said leased land, that he will not terminate said lease or repossess himself of said leased land until fifteen days have elapsed from time of delivery to said The Atlantic Refining Company of such written notice.

Witness:

E. R. COX, JR.

X JOHN DEAR

ORDER TO SHOW CAUSE.

(Filed Jan. 10, 1929.)

IN CHANCERY OF NEW JERSEY.

10

Between

ATLANTIC REFINING Co.,
a corporation of Penn-
sylvania,*Complainant,*

and

LOUIS KELLY and JACK
KELLY,*Defendants.*On Bill, &c.
Order to Show
Cause.

20

This matter being opened to the Court by Endicott & Endicott, solicitors of complainant, and the Court having read the bill of complaint in the above-entitled cause and the affidavit thereunto annexed;

It is, on this tenth day of January, A. D. 1929, ordered that the defendants, Louis Kelly and Jack Kelly, show cause before the Chancellor, at the Chancery Chambers, Real Estate and Law Building, Atlantic City, New Jersey, on Tuesday, the fifteenth day of January, A. D. 1929, at ten o'clock in the forenoon of said day or as soon thereafter as counsel can be heard, why the said defendants, Louis Kelly and Jack Kelly, should not be restrained and enjoined according to the prayer of said bill.

It is further ordered, that true but uncertified

copies of said bill of complaint and the affidavit thereto annexed and of this order be served upon said defendants, Louis Kelly and Jack Kelly, within one day from the date hereof.

E. R. WALKER,
C.

Respectfully advised,
R. H. INGERSOLL,
V. C.

10

AFFIDAVIT.

IN CHANCERY OF NEW JERSEY.

Between

ATLANTIC REFINING Co.,
a corporation of Penn-
sylvania,

Complainant,
and

LOUIS KELLY and JACK
KELLY,

Defendants.

On Bill, etc.
Affidavit.

20

30

STATE OF NEW JERSEY, }
COUNTY OF ATLANTIC, } ss.

LOUIS V. KELLY, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am one of the owners of Kelly's Service Station, located at the northeast corner of Delavan and Ventnor Avenues, Margate City, New Jersey.

2. Prior to the second day of February, A. D. 1928, negotiations were made with Mr. Edwin R. Cox, Jr., a representative of the Atlantic Refining Company, and thereafter, and on the second day of February, A. D. 1928, a contract was entered into
10 with the Atlantic Refining Company, and signed by me, in the name of Jack Kelly and myself.

3. The Atlantic Refining Company, on or about the second day of February, A. D. 1928, began the erecting of their equipment on the aforesaid property. On or about the twenty-ninth day of February, A. D. 1928, we began business.

4. Subsequent to the execution of the aforesaid
20 agreement, to wit: about the middle of February, A. D. 1928, the said company, through its representative, Mr. Edwin R. Cox, Jr., and I, entered into another agreement, whereby it was agreed that all gasoline should be sold to us by the said company, with a discount of two cents per gallon, below tank wagon price; and in the event that we sold more than ten thousand (10,000) gallons of gasoline, in any one month, we were to receive a further discount of one-half of one cent per gallon. The dis-
30 count of two cents per gallon, below tank wagon price, continued up to and including October, 1928, and the discount of one-half of one cent per gallon was discontinued after May tenth, 1928. Ever since, and up to the present time, the discount of both two cents per gallon and one-half of one cent per gallon, has been discontinued, and the said company

has refused to credit us with the discount, although demand has been made for the same, up to and including the present time.

5. The said company not only refuses to give us the discount as aforesaid, but has discriminated against us and is selling their gasoline to other gasoline service stations, dispensing their products, at a lower price than they sold the same to us. On the nineteenth day of January, 1929, they sold gasoline to their other customers in this city, for sixteen cents per gallon, including tax, and made a charge to us of seventeen cents per gallon, including tax. On Saturday, January twenty-sixth, 1929, the said company was selling their gasoline to their other customers for sixteen cents per gallon, including tax, and quoted their price to us for eighteen cents per gallon, including tax. The said company refuses to furnish us with gasoline according to the terms of the contract entered into on or about the middle of February, 1928, or according to the tank wagon price to their other dealers in this city.

6. Since the said company has been furnishing gasoline to us, we have had a number of complaints from our customers concerning the quality of the gasoline, as to the amount of dirt it contained, and also as to the amount of water in said gasoline.

A number of our customers further complained that they did not like the color of the gasoline and informed me that they were not buying any more gasoline from our service station. A number of these customers have refused to buy this company's gasoline from us.

A number of our customers have also complained that it was impossible to start their cars in the morning, without running down their batteries; and fur-

ther, that after the automobile started, it would stop, and this process would keep up for some time. A number of our customers, for the aforesaid reason, have refused to buy this company's gasoline, and have gone elsewhere to purchase other company's gasoline.

The company has given us credit for gasoline where we had to return the money to the customer for the reason that there was a large quantity of
10 water in the gasoline. We hold a statement from the company to that effect.

7. I complained to the representative of the company, on a number of occasions, as to the condition of the gasoline, and one time Mr. Edwin R. Cox, Jr., came to our place of business, and after purchasing jars from the store nearby, filled them with our gasoline, saying that he would take it to their
20 laboratory for a test, but up to the present time, we have not heard anything from the company in reference to same.

8. On a number of occasions the gasoline was delivered to us in motor trucks which had been used for the transportation of fuel oils. We complained strenuously to the company's representative, Mr. Edwin R. Cox, Jr., regarding this conduct, but in spite of our complaints, it kept on, up to and including the present time.

30 9. We were finally informed by a number of our customers that they were willing to bring their cars to our place of business and purchase gasoline from us, providing we installed another company's gasoline; and since the installation of the Tidewater Gasoline Company's pump, which was completed on or about December twenty-fourth, 1928, most of the customers who left us, because of their experience

with the Atlantic Refining Company's gasoline, have returned and are purchasing from us, the gasoline of the Tidewater Gasoline Company.

In order to build up our business, which was greatly dropping off from day to day, we were compelled to install the Tidewater Gasoline Company's pump.

10. The Atlantic Refining Company agreed to place a flower plot in front of our service station, and further agreed to paint the rear building and also to erect a fence on the east side of the aforesaid premises. The only part of the work which was carried out by this company, was the painting of the front of the building. 10

11. This company issues courtesy cards to customers, which permits the said customer to charge the gasoline purchased by him, to this company. A customer would appear at our service station and order us to fill up his automobile tank, which might require ten or fifteen gallons of gasoline, and after the tank had been filled, he would exhibit to us this card, above mentioned. Upon our informing the customer that the company did not permit us to extend credit to a customer holding this card, we were, on a great many instances, told by the customer that he did not have any money with which to pay us for the gasoline, and consequently we have lost large sums of money, because of the company's issuing these courtesy cards. 20 30

12. The copy of the contract attached to and made a part of the complainant's bill for injunctive relief, is not the written contract which was entered into by us, with this company, on the second day of February, A. D. 1928. The said contract has been materially changed and altered, and there has been

inserted in said contract the following, which appears on page two of the contract:

“In consideration of the investment required, it is agreed that the above location shall be used only for the sale of Atlantic Gasoline and Atlantic Motor Oils.”

As a matter of fact, Jack Kelly did not sign or execute the said contract, but the said contract was
10 signed by me alone.

The copy of the contract attached to and made a part of the complainant's bill for injunctive relief, has an acknowledgment wherein it states that Jack Kelly and I appeared before one, Scott H. Adams, notary public, located in Cape May County, who sets forth that he was satisfied that we were the parties mentioned in the above agreement, and that he first made known to us the contents thereof, and that Jack Kelly and I acknowledged that we
20 signed, sealed and delivered the same as our voluntary acts and deeds, all of which is hereby certified. As a matter of fact, neither Jack Kelly nor I, has ever seen the said Scott H. Adams, nor have we ever, to our knowledge, heard of the said Scott H. Adams.

Said acknowledgment was taken on the second day of May, A. D. 1928, whereas Jack Kelly and I, did not on that date, nor have we on any other date, up to and including the present time, authorized anyone to take our acknowledgment, or appeared
30 before any notary public, for the purposes therein contained.

LOUIS V. KELLY.

Sworn to and subscribed before me this second day of February, A. D. 1929.

DOROTHY E. ANDERSON,
Notary Public of N. J.

AFFIDAVIT.

IN CHANCERY OF NEW JERSEY.

Between	}	On Bill, etc. Affidavit.	10
ATLANTIC REFINING Co., a corporation of Penn- sylvania,			<i>Complainant,</i>
			and
LOUIS KELLY and JACK KELLY,			<i>Defendants.</i>

STATE OF NEW JERSEY, }
COUNTY OF , } ss.

JACK A. KELLY, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I was one of the owners of the Kelly's Service Station, located at the northeast corner of Delavan and Ventnor Avenues, Margate City, New Jersey.

30

2. Prior to the second day of February, A. D. 1928, negotiations were made with Mr. Edwin R. Cox, Jr., a representative of the Atlantic Refining Company, and thereafter, and on the second day of February, A. D. 1928, a contract was entered into with the Atlantic Refining Company, and signed by

my brother, Louis V. Kelly, in the name of Louis V. Kelly and myself.

3. The Atlantic Refining Company, on or about the second day of February, A. D. 1928, began the erecting of their equipment on the aforesaid property. On or about the twenty-ninth day of February, A. D. 1928, we began business.

10 4. We had been receiving a discount of two cents per gallon below tank wagon price, on the gasoline purchased by us from this company, and in the event that we sold more than ten thousand (10,000) gallons of gasoline in any one month, we were to receive a further discount of one-half of one cent, per gallon. The discount of two cents per gallon, below tank wagon price, continued up to and including October, 1928, and the discount of one-half of one cent per gallon was discontinued after May
20 tenth, 1928. Ever since, and up to and including the present time, the discount of both two cents per gallon and one-half of one cent per gallon, has been discontinued, and the said company has refused to credit us with the discount, although demand has been made for the same, up to and including the present time.

5. Since the said company has been furnishing gasoline to us, we have had a number of complaints
30 from our customers, concerning the quality of the gasoline, as to the amount of dirt it contained, and also as to the amount of water in said gasoline.

A number of our customers further complained that they did not like the color of the gasoline and informed me that they were not buying any more gasoline from our service station. A number of

these customers have refused to buy this company's gasoline from us.

A number of our customers have also complained that it was impossible to start their cars in the morning, without running down their batteries; and further, that after the automobile started it would stop, and this process would keep up for some time. A number of our customers, for the aforesaid reason, have refused to buy this company's gasoline, and have gone elsewhere to purchase other company's gasoline. 10

The company has given us credit for gasoline where we had to return the money to the customer for the reason that there was a large quantity of water in the gasoline. We hold a statement from the company to that effect.

7. We complained to the representative of the company on a number of occasions, as to the condition of the gasoline, and one time Mr. Edwin R. Cox, Jr., came to our place of business, and after purchasing jars from the store nearby, filled them with our gasoline, saying that he would take it to their laboratory for a test, but up to the present time, we have not heard anything from the company in reference to same. 20

8. On a number of occasions the gasoline was delivered to us in motor trucks which had been used for the transportation of fuel oils. We complained strenuously to the company's representative, Mr. Edwin R. Cox, Jr., regarding this conduct, but in spite of our complaints, it kept on, up to and including the present time. 30

9. We were finally informed by a number of our customers that they were willing to bring their cars

to our place of business and purchase gasoline from us, providing we installed another company's gasoline; and since the installation of the Tidewater Gasoline Company's pump, which was completed on or about the twenty-fourth day of December, 1928, most of the customers who left us, because of their experience with the Atlantic Refining Company's gasoline, have returned and are purchasing from us, the gasoline of the Tidewater Gasoline Company.

10 In order to build up our business, which was greatly dropping off from day to day, we were compelled to install the Tidewater Gasoline Company's pump.

10. The Atlantic Refining Company agreed to place a flower plot in front of our service station, and further agreed to paint the rear building and also to erect a fence on the east side of the afore-
20 said premises. The only part of the work which was carried out by this company, was the painting of the front of the building.

11. This company issues courtesy cards to customers, which permits the said customer to charge the gasoline purchased by him, to this company. A customer would appear at our service station and order us to fill up his automobile tank, which might require ten or fifteen gallons of gasoline, and
30 after the tank had been filled, he would exhibit to us this card, above mentioned. Upon our informing the customer that the company did not permit us to extend credit to a customer holding this card, we were, on a great many instances, told by the customer, that he did not have any money with which to pay us for the gasoline, and consequently we have

lost large sums of money, because of the company's issuing these courtesy cards.

12. The copy of the contract attached to and made a part of the complainant's bill for injunctive relief, is not the written contract which was entered into by us, with this company, on the second day of February, A. D. 1928. The said contract has been materially changed and altered and there has been inserted in said contract, the following, which appears on page two of the contract: 10

“In consideration of the investment required, it is agreed that the above location shall be used only for the sale of Atlantic Gasoline and Atlantic Motor Oils.”

As a matter of fact, I did not sign or execute the said contract, but the said contract was signed by my brother, Louis V. Kelly, for him and me. 20

The copy of the contract attached to and made a part of the complainant's bill for injunctive relief has an acknowledgment wherein it states that my brother, Louis V. Kelly, and I appeared before one, Scott H. Adams, notary public, located in Cape May County, who sets forth that he was satisfied that we were the parties mentioned in the above agreement, and that he first made known to us the contents thereof, and that Louis V. Kelly and I acknowledged that we signed, sealed and delivered the same as our voluntary acts and deeds, all of which is hereby certified. As a matter of fact, neither Louis V. Kelly nor I, has ever seen the said Scott H. Adams, nor have we ever, to our knowledge, heard of the said Scott H. Adams. 30

Said acknowledgment was taken on the second day of May, A. D. 1928, whereas Louis V. Kelly

and I did not, on that date, nor have we on any other date, up to and including the present time, authorized anyone to take our acknowledgment, or appeared before any notary public, for the purposes therein contained.

JACK A. KELLY.

Sworn to and subscribed before me this 4th day of February, A. D. 1929.

10

SAMUEL GREEN,
An Attorney-at-Law of New Jersey.

STATE OF NEW JERSEY }
COUNTY OF ATLANTIC } ss.

20 FRANCIS J. MULHOLLAND, of full age, being duly sworn on his oath, according to law, deposes and says:

1. I operate a gasoline service station at Albany and Atlantic Avenues, Atlantic City, New Jersey, where I sell products of the Atlantic Refining Company, including gasoline,

30 2. I have been informed by Mr. Louis Kelly, that he was charged, on January nineteenth, 1929, the sum of seventeen cents (\$.17) per gallon for gasoline, whereas the price of said gasoline to me on that date, was the sum of sixteen (\$.16) cents.

3. I was further informed by Mr. Louis Kelly, that on the twenty-sixth day of January, 1929, the Atlantic Refining Company made a charge to him of eighteen cents (\$.18) per gallon for gasoline,

whereas I was purchasing the same gasoline for the sum of sixteen cents (\$.16) per gallon.

4. On Tuesday, January 29th, 1929, Mr. Louis Kelly informed me that gasoline was offered for sale to him for the sum of seventeen cents (\$.17) per gallon, whereas I could purchase the same gasoline for the sum of sixteen cents (\$.16) per gallon.

5. On or about the twenty-fifth day of January, 10
Roosevelt
1929, I was present at station at Albany and Atlantic Avenues, Atlantic City, New Jersey, when I overheard the conversation of Mr. Edwin R. Cox, Jr., the representative of the Atlantic Refining Company, in which he directed the driver of one of the Atlantic Refining Company trucks to charge Kelly's Gasoline Service Station, the sum of seventeen cents (\$.17) per gallon for gasoline instead of sixteen cents (\$.16) per gallon, whereas I purchased 20
the same gasoline at a lower figure, to wit: sixteen cents (\$.16) per gallon.

In margin:

F J M

Interlineation of word
"Roosevelt" made
before signing.

FRANCIS J. MULHOLLAND.

Sworn to and subscribed before me this 1st day
of February, A. D. 1929.

30

(Seal)

WILLIAM S. EMLEY, JR.,
Notary Public of New Jersey.

STATE OF NEW JERSEY }
COUNTY OF ATLANTIC } ss.

IRA WOOD, of full age, being duly sworn upon his oath according to law, deposes and says:

10

1. I am the assistant manager of a Five and Ten Cent Store, and reside on Kenyon Avenue, Margate City, New Jersey.

2. I was accustomed to purchase Atlantic Refining Company's gasoline from the Kelly's Service Station, at the northeast corner of Delavan and Ventnor Avenues, Margate City, New Jersey, until I found that the said gasoline of the Atlantic Refining Company, contained considerable water.

20

3. I, therefore, was compelled to buy some other company's products, other than the Atlantic Refining Company's merchandise.

IRA F. WOOD.

Sworn to and subscribed before me this 4th day of February, 1929.

30 (Seal)

HELEN A. WISHAM,
Notary Public of New Jersey.

My commission expires October 27, 1929.

STATE OF NEW JERSEY }
COUNTY OF ATLANTIC } ss.

JOSEPH BENSON, of full age, being duly sworn upon his oath, according to law, deposes and says.

1. I am a resident of Margate City, New Jersey, 10
residing on Coolidge Avenue.

2. I was accustomed to purchase Atlantic Refining Company's gasoline from the Kelly's Service Station at the northeast corner of Delavan and Ventnor Avenues, Margate City, New Jersey, until I had considerable trouble with dirt in the gas line of my automobile, which I found to be in the gas-line of the said Atlantic Refining Company.

20

3. I have, therefore, been compelled to give up the use of the said Atlantic Refining Company's gasoline and have bought other company's products, other than the Atlantic Refining Company's merchandise.

JOSEPH BENSON.

Sworn to and subscribed before me this 4th day of February, 1929.

(Seal) JOSEPH DE ANGELIS, 30
Notary Public.

My commission expires October 17, 1933.

STATE OF NEW JERSEY }
COUNTY OF ATLANTIC } ss.

WILLIAM GOBRIGHT, of full age, being duly sworn upon his oath, deposes and says:

10 1. I am a building contractor, residing in Margate City, New Jersey.

2. I was accustomed to purchase Atlantic Refining Company's gasoline from Kelly's Service Station, at the northeast corner of Ventnor and Delavan Avenues, Margate City, New Jersey, until I found that the gasoline was a very peculiar color, which color varied from time to time. I used the Atlantic Refining Company's gasoline in both my
20 automobile and my boat, purchasing the same in five-gallon cans. I also found that the gasoline of the Atlantic Refining Company contained considerable water.

3. I was, therefore, compelled to buy some other company's products, other than the Atlantic Refining Company's merchandise.

WILLIAM GOBRIGHT.

30 Sworn to and subscribed before me this 2nd day of February, 1929.

ARTHUR D. WILSON.

(Seal)

STATE OF NEW JERSEY }
COUNTY OF ATLANTIC } ss.

JAMES MCPHILLIPS, of full age, being duly sworn upon his oath, according to law, deposes and says:

1. I am a manager for the American Store located at the northwest corner of Clarmont and Ventnor Avenues, Margate City, New Jersey. I was accustomed to purchase Atlantic Refining Company's gasoline from the Kelly's Service Station, located at the northeast corner of Delavan and Ventnor Avenues, Margate City, New Jersey, until I found that because of the dirt in the said gasoline, it became necessary for me to have my gasoline line and carburetor blown out. This was necessitated because of my using Atlantic Refining Company's gasoline. 10

2. I was, therefore, compelled to buy some other company's products, other than the Atlantic Refining Company's merchandise.

JAMES MCPHILLIPS.

Sworn to and subscribed before me this fifth day of February, 1929.

(Seal) CARL M. VOELKER, 30
Notary Public for New Jersey.
My commission expires January 10, 1931.

Affidavit of Samuel Weinberg

STATE OF NEW JERSEY }
COUNTY OF ATLANTIC } ss.

SAMUEL WEINBERG, of full age, being duly sworn upon his oath, according to law, deposes and says:

10 1. I am a registered pharmacist of the State of New Jersey, operating a drug store at the southwest corner of Gladstone and Ventnor Avenues, Margate City, New Jersey.

2. I was accustomed to purchase Atlantic Refining Company's gasoline from the Kelly's Service Station, at the northeast corner of Delavan and Ventnor Avenues, Margate City, New Jersey, until I found that the gasoline did not permit the motor in my automobile to function properly.

20

3. Upon purchasing gasoline from companies other than the Atlantic Refining Company, I found that my engine functioned properly and that there was not any mechanical defect in the same.

4. I was, therefore, compelled to buy my gasoline from other service stations, which did not sell the gasoline sold by the Atlantic Refining Company.

SAMUEL WEINBERG.

30

Sworn to and subscribed before me this 13th day of February, 1929.

DOROTHY E. ANDERSON,
Notary Public of New Jersey.

STATE OF NEW JERSEY, }
COUNTY OF ATLANTIC } ss.

ALFRED HENSEL, of full age, being duly sworn on his oath, according to law, deposes and says:

1. I operate a gasoline service station on the White Horse Pike, Egg Harbor, New Jersey, where I sell products of the Atlantic Refining Company including gasoline. 10

2. I also sell the products of two other companies.

3. I know that the price to me on gasoline from all three companies including the Atlantic Refining Company between January twenty-second, 1929, and present date, inclusive, is sixteen cents (\$.16) per gallon, including tax. 20

4. I purchased gasoline from the Atlantic Refining Company on the following dates at sixteen cents (\$.16) per gallon including tax.

January 24, 1929.

ALFRED HENSEL.

Sworn to and subscribed to before me this 7th day of February, A. D. 1929.

(Seal) JOHN A. CORE, 30
Notary Public of New Jersey.
My commission expires October 8, 1930.

ORDER DISMISSING ORDER TO SHOW
CAUSE.

(Filed March 9, 1929.)

IN CHANCERY OF NEW JERSEY.

10

Between
ATLANTIC REFINING Co.,
a corporation of Penn-
sylvania,
Complainant,
and
20 LOUIS KELLY AND JACK
 KELLY,
 Defendants.)
On Bill, etc.
Order Dismissing
Order to Show
Cause.

30 On the order to show cause in this matter granted
on the tenth day of January, 1929, having come on
to be heard and having been continued, and the
parties having agreed that said order should be
dismissed, it is on this ninth day of March, 1929,
ordered that said order to show cause is hereby
dismissed.

E. R. WALKER,
C.

Respectfully advised,
ROBERT H. INGERSOLL,
V. C.

We consent to the above order.

ENDICOTT & ENDICOTT,
Solicitors for Complainant.
ALBERT A. F. MCGEE,
Solicitor for Defendants.

[ENDORSEMENT]

10

Service of the within copy thereof
acknowledged this 7th day of March,
A. D., 1929.

Albert A. F. McGee,
Sol. of Defts.

20

30

ANSWER AND COUNTER-CLAIM.

(Filed Mar. 22, 1929.)

IN CHANCERY OF NEW JERSEY.

10

Between

ATLANTIC REFINING Co.,
a corporation of Penn-
sylvania,*Complainant,*
andLOUIS KELLY AND JACK
KELLY,*Defendants.*On Bill, etc.
Answer and Counter-
Claim.

20

The answer of the defendants, Louis Kelly and Jack Kelly.

The defendants, Louis Kelly and Jack Kelly, answering the bill of complaint, say that:

1. Paragraph one is admitted.
2. Paragraph two is admitted.
3. Paragraph three is admitted.
4. Paragraph four is denied.
5. Paragraph five is denied.

30

6. These defendants have no knowledge or information sufficient to form a belief as to the statement in paragraph six.

7. Paragraph seven is admitted.

8. These defendants have no knowledge or information sufficient to form a belief as to the statement in paragraph eight.

9. These defendants have no knowledge or information sufficient to form a belief as to the statement in paragraph nine.

10. Paragraph ten is denied. •

10

COUNTER-CLAIM.

By way of counter-claim against the complainant, 20
the defendants, Louis Kelly and Jack Kelly, say
that:

1. Some time prior to the second day of February, A. D., 1928, negotiations were made with Edwin R. Cox, Jr., a representative of the complainant, and thereafter and on the second day of February, A. D., 1928, a contract was entered into with the complainant, said contract being executed by the defendant, Louis Kelly, in the name of both defendants. 30

2. Complainant, on or about the second day of February, A. D., 1928, began the erecting of their equipment on the property of the defendants, and on or about the 29th day of February, A. D., 1928, the defendants began business at the northeast

corner of Delavan and Ventnor Avenues, Margate City, New Jersey.

3. Subsequent to the execution of the aforesaid agreement, to wit: about the middle of February, A. D., 1928, the complainant, through its representative, Edwin R. Cox, Jr., and the defendant, Louis Kelly, entered into another agreement, whereby it was agreed that all gasoline should be sold to the defendants by the complainant with a discount of two cents per gallon, below tank wagon price; and in the event that the defendants sold more than ten thousand (10,000) gallons of gasoline, in any one month, the defendants were to receive a further discount of one-half of one cent per gallon. The discount of two cents per gallon, below tank wagon price, continued up to and including October, 1928, and the discount of one-half of one cent per gallon was discontinued after May tenth, 1928. Ever since, and up to the present time, the discount of both two cents per gallon and one-half of one cent per gallon, has been discontinued, and the said complainant has refused to credit the said defendants with the discount, amounting to four hundred ninety-two dollars and thirty-two cents (\$492.32), although demand has been made for the same, up to and including the present time.

4. The complainant not only refused to give the defendants the discount as aforesaid, but has discriminated against the defendants, and is selling their gasoline to other gasoline service stations dispensing their products at a lower price than they sold the same to the defendants. On the nineteenth day of January, 1929, and on numerous and various other occasions, the complainant sold gasoline to

their other customers for less than the amount charged the defendants for each gallon of gasoline purchased, including state tax, even where the other customers did not operate what is commonly known as a one hundred per cent company station. The complainant refuses and has not, up to and including the present time, delivered their gasoline and other products to the defendants at the same price charged to their other dealers.

10

5. Since the complainant has been selling gasoline to the defendants, they have had a number of complaints from their customers, concerning the color of the gasoline, the impossibility of starting their automobiles in the morning, and the amount of dirt and water in said gasoline. Because of these complaints, the defendants have lost considerable business, and have been informed by numerous customers, that they would not return and purchase gasoline from the defendants' service station.

20

6. The complainant, realizing that there was water in their gasoline, credited the defendants with the sum of money which the defendants had refunded to their customers.

7. The defendants complained to the representative of the complainant, on a number of occasions, as to the condition of the gasoline. Their representative, on one occasion, drew some gasoline from the defendants' pumps, informing the defendants that he would have a laboratory test made of the same. However, your defendants have not heard from the said representative since that time.

30

8. On a number of occasions the gasoline was de-

livered to the defendants in motor trucks which had been used for the transportation of fuel oils. Complaint was made by the defendants to the complainant, relative to delivery made in this manner, but in spite of the defendants' complaints, the delivery of the gasoline is made to the defendants' service station in the same manner, up to and including the present time.

10 9. The complainant did not carry out the terms of its agreement with the defendants, in that the said complainant agreed to place a flower plot in front of the defendants' service station, and further, agreed to do some other work in and about the buildings on the premises. This they have neglected to do.

10. The defendants have been greatly annoyed and have lost money, through the courtesy cards
20 which are issued by the complainant, in that the complainant will not permit the defendants to accept the courtesy cards in payment of their gasoline. The holder of one of these cards would drive to the defendants' service station, have the automobile tank filled up with gasoline and then produce the courtesy card. When told by the defendants that they did not honor said cards, the customer would inform the defendants that he did not have
30 any money for the gasoline, and it would be necessary for the defendants to wait for the money, and in most instances, the various sums of money have not been collected.

11. The copy of the contract attached thereto and made a part of the complainant's bill, is not the written contract which was entered into by the de-

fendants on the second day of February, A. D., 1928. Said contract has been materially changed and altered, and there has been inserted in said contract, the following, which appears on page two of the contract:

“In consideration of the investment required, it is agreed that the above location shall be used only for the sale of Atlantic Gasoline and Atlantic Motor Oils.”

10

12. The defendants at no time appeared before a notary public for the purpose of having the said notary public take their acknowledgment, as appears on the contract which is attached to the complainant's bill. As a matter of fact, the said defendant, Jack Kelly, did not sign or execute the said contract, but the said contract was signed and executed by the defendant, Louis Kelly.

The said defendants are without adequate remedy 20
in the courts of law, and, therefore, pray:

1. That the said complainant, Atlantic Refining Company, a corporation of Pennsylvania, may answer this counter-claim and each statement therein made.

2. That the said complainant, Atlantic Refining Company, a corporation of Pennsylvania, may be ordered and decreed to surrender the said contract 30
to the defendants.

3. That the said contract may be decreed to be null and void and to be no longer a lien upon the premises therein described against the said defendants or either of them, or any person or persons claiming by, from or under them or either of them.

4. That the said complainant may be ordered and decreed to remove from the defendants' premises, their equipment.

5. That the said contract may be ordered and decreed to be rescinded, and all the conditions therein contained.

6. That the complainant may be ordered and decreed to pay to the defendants, the sum of four hundred ninety-two dollars and thirty-two cents (\$492.32).

ALBERT A. F. MCGEE,
Solicitor for and of Counsel with Defendants.

REPLY AND ANSWER TO COUNTER-CLAIM.

(Filed Apr. 18, 1929.)

IN CHANCERY OF NEW JERSEY.

Between		10
ATLANTIC REFINING Co., a corporation of Penn- sylvania, <i>Complainant,</i>	}	On Bill, etc. Reply and Answer to Counter-claim.
and LOUIS KELLY AND JACK KELLY, <i>Defendants.</i>		
		20

Complainant joins issue with answer of defendants.

Complainant answering the counter-claim of defendants, Louis Kelly and Jack Kelly, says that:

1. Paragraph one is admitted.
2. Paragraph two is admitted. 30
3. Paragraph three is denied.
4. Paragraph four is denied.
5. Complainant has no knowledge of the matters

consent to file same out of time is hereby made.

Albert A. F. McGee,
Solicitor for Defendants.

ORDER OF REFERENCE.

10

(Filed Apr. 24, 1929.)

IN CHANCERY OF NEW JERSEY.

Between

ATLANTIC REFINING Co.,
a corporation of Pennsylvania,

Complainant,
and

LOUIS KELLY AND JACK
KELLY,

Defendants.

20

On Bill, etc.
Order of Reference.

This matter being opened to the Court by Endicott and Endicott, solicitors of the complainant, and it appearing that, Albert A. F. McGee, solicitor of the defendants, has consented hereto: 30

It is, on this 18th day of April, 1929, on motion of Endicott and Endicott, solicitors of the complainant, ordered, that the above entitled cause be re-

ferred to the Honorable Robert H. Ingersoll, one of the Vice-Chancellors of this court, to hear the same for the Chancellor, and to report thereon to him and to advise what order or decree should be made therein.

E. R. WALKER,
C.

10

We hereby consent to the entry of the foregoing order.

ALBERT A. F. MCGEE,
Solicitor of Defendants.
ENDICOTT & ENDICOTT,
Solicitors for Complainant.

20

30

ORDER OF DESIGNATION.

(Filed June 21, 1929.)

IN CHANCERY OF NEW JERSEY.

Between

ATLANTIC REFINING CO.,
a corporation of Penn-
sylvania,

Complainant,
and

LOUIS KELLY AND JACK
KELLY,

Defendants.

10

On Bill, etc.
Order of Designation.

The above entitled cause having been referred to
HONORABLE ROBERT H. INGERSOLL, one of the Vice-Chancellors of this Court, for hearing, and application having been made for designation of a day for hearing, and counsel having consented to the making of this order: 20

It is, on this 21st day of June, 1929, on motion of Endicott & Endicott, solicitors for complainant, ordered that the above entitled cause be set down for hearing on the 18th day of September 1929, at ten o'clock in the forenoon, at the Chancery Chambers, Atlantic City, N. J. 30

R. H. INGERSOLL,
V. C.

We consent to the making of the above order.

ALBERT A. F. MCGEE,
Solicitor for Defendants.

TESTIMONY.
 IN CHANCERY OF NEW JERSEY.

10	Between ATLANTIC REFINING COM- PANY, a corporation of Pennsylvania, <i>Complainant,</i> and LOUIS KELLY and JACK KELLY, <i>Defendants.</i>	}	On Bill, etc. Final Hearing.
----	--	---	---------------------------------

20 Atlantic City, N. J., September 18, 1929.

TESTIMONY.

Before HON. ROBERT H. INGERSOLL, Vice-Chancellor.

30 APPEARANCES:
 For the complainant: MESSRS. ENDICOTT & ENDI-
 COTT, and EMERSON L. RICHARDS, ESQ.
 For the defendants: ALBERT A. F. MCGEE.

EDWIN R. COX, JR., SWORN.

Direct examination.

By Mr. Richards:

Q. Mr. Cox, are you employed by the Atlantic Refining Company?

A. Yes, sir.

10

Q. What is your position with the company?

A. District manager, South Jersey.

Q. Were you district manager in February of 1928?

A. Yes, sir.

Q. Did you negotiate an agreement with the defendants, Louis and Jack Kelly?

A. Yes, sir.

Q. I show you a paper and ask you if this paper, with the exception of this acknowledgment which was pasted to it is the paper that represents the contract?

20

A. Yes, sir.

Q. Now, who signed this contract?

A. Louis Kelly, Louis and Jack Kelly, signed by Louis Kelly.

Q. He is one of the defendants here?

A. Yes, sir.

Q. Was that signed in your presence?

A. Yes, sir.

30

Q. I notice that the Atlantic Refining Company's signature is by Harold B. Stone; do you know whether that is his signature or not?

A. Yes, sir, that is his signature.

Q. Was that signed in your presence or not?

A. No, sir, but we have an acknowledgment on

there taken by our office, which was taken by our office in front of Mr. Stone.

Q. Now, there is pasted on to this contract two acknowledgments; do you know when they were appended to this contract?

A. Not definitely.

Q. They were not put there immediately after the execution of the contract, were they?

A. I don't believe so.

10 Q. Do you know whether or not at the time that the contract was made, was this clause in typewriting upon it: "In consideration of the investment required, it is agreed that the above location shall be used only for the sale of Atlantic gasoline and Atlantic motor oils"?

A. That was in there.

20 Q. And was there, at the time that the contract was signed, this clause in the contract which was printed on the first page: "That the party of the first part, in consideration of the party of the second part purchasing all gasoline, motor fuels, motor oils and greases handled and dispensed from said piece of land first above described, solely from the party of the first part, as the party of the first part following specified prices prevailing in the town or city in which said land is located of gasoline and motor fuels at tank wagon prices to dealers of motor oils and greases as per schedule on prices to dealers"?

30 A. Yes, sir, that was printed in there.

Q. That was printed in there and was in there at the time it was signed by Mr. Kelly and by Mr. Stone?

A. Yes, sir.

Q. Now, did you forward this contract, after it was signed by Kelly, to the company's main office?

A. To the Philadelphia office for Mr. Stone's signature.

Q. And it was signed by him?

A. Signed by him, yes, sir.

Q. Returned here, or a copy was?

A. A copy was returned to Mr. Kelly and the other copy was kept in our file in the Philadelphia office.

Q. Now, after this contract was signed, did the company proceed to make improvements to the gasoline station? 10

A. Yes, sir.

Q. What did the company do?

A. We installed pumps and tanks, put signs up, erected a driveway and approaches.

Q. Now, you say erected driveway and approaches, you mean approaches in from the street?

A. From the street, a driveway around the pumps.

Q. Do you know how much this work cost the company? 20

A. About \$2500.

Q. Will you tell me accurately just how much it cost?

A. \$2,530.

Q. I show you two pictures of the station and ask you if you can point out the driveway which you say was improved?

A. Yes, sir, on both sides. 30

Q. Witness is indicating a driveway entering from the street in a circular direction, apparently extending to the cross street?

A. Yes. In other words, approaches from Ventnor and Delevan Avenues with a radius on this side swinging in there.

(Two photographs offered, received in evidence and marked Exhibits C1 and C2.)

Q. Now, did the defendants proceed to carry out their part of this contract and purchase gasoline and oils from you?

A. For a while, about a year, yes, sir.

Q. For about a year?

A. Until December, 1928.

10 Q. And during that time, did they sell or dispense products of any other company, to your knowledge?

A. Not to my knowledge during that time, no, sir.

Q. Were you down there occasionally?

A. Right along.

Q. How often?

A. I would say at least once every two weeks.

Q. And during that time, you saw no signs of them departing from this contract?

20 A. No, sir.

(Contract offered in evidence.)

Mr. McGee: If the Court please, I object to it.

The Court: What is the objection?

Mr. McGee: As to the testimony relative, that he has testified to part of the contract, that appears
30 to be the testimony so far.

The Court: The contract can be admitted, but not the acknowledgments.

Mr. Richards: So far as the acknowledgments are concerned, they are simply torn off so far as

we are concerned. That paper didn't require to be acknowledged, and we are not contesting that those acknowledgments were placed upon this contract after the time that it was executed.

(Contract admitted exclusive of the acknowledgments, and marked Exhibit C3.)

Q. In December of 1928, what did the defendants proceed to do? 10

Mr. McGee: I don't know whether that contract has been recorded or not, and I would like to say also as to the recording of it, because that would be based upon the acknowledgments.

The Court: Certainly.

Mr. Richards: It has not been recorded. 20

A. In December they proceeded to put in a pump and tank belonging to a competitive company and to dispense gasoline other than the Atlantic Refining Company's gasoline.

Q. To whom did the pump belong?

A. It bore the trade-mark of the Tidewater Oil Company, and they dispensed their products through it. I imagine it belonged to the Tidewater.

Q. Where was this tank located?

A. Right adjoining our driveway. 30

Q. On the land that was mentioned in this contract or land outside of the contract?

A. It was within a few inches of our driveway, just outside the driveway.

Q. Can you —

A. I can point it out, yes, sir. This was the first

pump erected right in here, here is the driveway and here is the pump. (Indicating on photograph.)

Q. This white pump?

A. No, it is the Tidewater pump, draw up in there and filled from that.

Q. Can you draw on there?

The Court: That is the first pump that was put in?

10

A. Yes.

Q. I have marked on here with an arrow pointing to the pump; is that the pump?

A. That is the pump, yes, sir.

Q. Now, when a purchaser for gasoline came along, where did they fill the automobile from?

A. From the driveway erected by us.

Q. How long did that continue?

A. It still is being continued.

20

Q. When was the picture taken that has been offered in evidence?

A. On the 16th, I believe the receipt shows.

Q. Of what month?

A. Of this month.

Q. Are they now dispensing other gasolines and oils besides that of your company?

A. Yes, sir.

Q. What companies?

30 A. Quite a few, Texaco, Sinclair, Tidewater, see the picture. I could distinguish more pumps, got so many of them in, there is the Texaco, Tidewater and Sinclair.

Q. Are they dispensing your gasoline as well?

A. They may be dispensing a little of our gasoline, but they have bought so very little that it is practically negligible.

Q. Are the pumps and other improvements that you placed in still there?

A. They are still there, yes, sir.

Q. Now, did your company bill them for the gasoline and oils at the prices agreed upon in the contract?

A. We billed them for a little better than prices agreed on in the contract.

Q. Well, have you at all times billed them as good as that in the contract?

10

A. We have at all times billed them as good as the prices in the contract, yes, sir.

Q. That is to say, the prices of gasoline and motor fuels at the tank wagon prices to dealers?

A. At all times we billed them either that way or better than that.

Q. And the motor oils and greases at the schedule of prices to dealers?

A. Yes, sir.

Q. You say "or better;" will you explain to the Court what you mean by better?

20

A. Why, while our contract read at the prevailing tank wagon prices, we billed them at one time two cents under that price, so they could meet competition in the neighborhood, and then, as is our custom, when the dealers split business, we billed them one cent under the tank wagon and not two under. Those prices are fixed in our warehouse in Pleasantville, and we bill all our dealers the same way.

Q. And there has been no discrimination against them in the prices charged them for the products which they purchased from you?

30

A. Absolutely none.

Q. Now, when you discovered that the defendants were dispensing Tydol gas from this pump, what did you do?

A. Even before they started dispensing, when

they started to put it in, I objected and told them it was a breach of our contract, and asked them if they would not desist from the breach.

Q. Who did you talk to about that?

A. Louis Kelly and his father.

Q. Who is his father?

A. His first name, you mean?

Q. Yes.

A. I am sorry, I don't know his father's first
10 name.

Q. It isn't the other defendant?

A. No, that is Jack Kelly, that is his brother.

Q. What did Mr. Kelly say?

A. At the time he simply refused to stop putting the pump in, went right ahead with the breach of the contract.

Q. Now, after the pump was in there and in use, did you see him again?

A. Yes.

20 Q. Did you discuss with him the question of the use of the pump?

A. The possibility of discontinuance I discussed with him, and the only way he would discontinue, the only way he would continue buying from us again, I should say, would be I give him the same price on split business as we did in a hundred per cent, and we couldn't do that, as it would be to discriminate against our other business.

30 Q. Will you explain to the Court just what you mean by that split business?

A. We have stations that handle nothing but our products, we call them a hundred per cent Atlantic stations, and we feel they are entitled to better prices than the dealer who straddles the fence, and handles two or three different brands of products. The man who devotes all of his attention to our

product is entitled to a better price than the man who devotes only part of his time.

Q. For illustration, what price did you give the man who has a hundred per cent station?

A. Today we are giving the man that has a hundred per cent station two cents under tank wagon, or twelve cents. Our tank wagon today is fourteen cents a gallon, we are selling him twelve cents; if he is handling our product along with another product we would sell him at thirteen cents today. 10

Q. This Tydol pump went in December, 1928?

A. Yes, sir.

Q. When was it you had this talk about the split business with Mr. Kelly?

A. Well, immediately when they were putting the pump in, I discussed it with him.

Q. And at that time what was the difference in your prices?

A. One cent, always has been one cent.

Q. One and two cents, you mean? 20

A. Two cents in hundred per cent, one cent for split.

Q. After they started to dispense Tydol gas, they did continue to purchase Atlantic gasoline?

A. Yes, sir.

Q. How did you bill them after that time?

A. We billed them at one cent under the tank wagon price.

Q. There has been three —

A. May I add how we billed them, continuing my answer, in three different occasions that I know of where strange drivers had gone to Mr. Kelly, Mr. Kelly had talked them into giving him hundred per cent price, and the green driver gave it. We wrote to Mr. Kelly and told him it was given to him in error and asked that he make good the additional cent which to date he has refused to do. In other 30

words, he took the hundred per cent price by taking advantage of a green driver, and we attempted to get him in line on those three deals with our other split dealers.

Q. Now then, the last time you talked to Mr. Kelly was when, on the subject of this contract?

A. It has been about three months ago.

Q. What was the conversation at that time?

A. That conversation at that time simply hinged
10 on the question as to whether or not we could give him a hundred per cent price with a split station. At that time we said it was absolutely impossible, and it still is impossible.

Q. What I am getting at is this, you called Mr. Kelly's attention to the fact that you had what, on the surface of it at least, appears to be an exclusive contract with him, didn't you?

A. Yes, sir.

Q. What excuse did Mr. Kelly give you for refus-
20 ing to continue under the terms of that contract?

A. Simply that, the only excuse that I could get, that the competitive salesman was a nice fellow and he wanted to put the pump in and he was going to do it.

Q. At that time did he allege that there was anything wrong with your pump?

A. No, sir.

Q. Did he at any time complain about the character of the product furnished him?

A. Yes, sir.
30

Q. He did?

A. When we first put our tanks in there we were required to sink the tanks due to the water we were digging in, required to sink the tanks in this water, the tank man filled the tanks with water to overcome the buoyancy and he should have pumped all that water out. I imagine, we have no way of

proving, but Mr. Kelly on his first three sales claimed the customers got water. We didn't dispute his account, we simply said all right, how much gasoline did you give your customers, and he said about twenty gallons, so we put a credit through for twenty gallons, and that was all the way to it.

Q. After that?

A. That was when the tank first went in.

Q. After that did you ever have any complaints from Mr. Kelly concerning the quality of your product? 10

A. Yes, we had one other complaint where Mr. Kelly feared that his competitor across the street, selling Sun gasoline, was getting more of the customers than he was entitled to, and he claimed that our gasoline was detonating or knocking. We took some gasoline to test it and we got the customers that were complaining and Mr. Kelly, when we got one of those customers back, Mr. Kelly said, "It is all right, we got the customer back, the gasoline is better than the competitor's gasoline," that is all there was to it, so that we didn't go on with our test when he was satisfied. 20

Q. Did you ever have any complaints outside of those?

A. Those were the only complaints we had.

Q. At the time that you had these conversations about the contract did you say anything to Mr. Kelly about the intention of your company to insist upon the terms of the contract? 30

A. Yes, sir.

Q. What did you tell him?

A. I told him that we would have to insist that he stay a hundred per cent Atlantic.

Q. Do you know—when you first saw this tank

going in, did you report that matter to the company?

A. Immediately.

Q. You know whether they took any action in the matter?

A. Immediately.

Q. Do you know what that action was?

A. We conferred with Mr. Endicott and attempted to—I beg pardon.

10

Mr. Richards: I call your Honor's attention to the fact the bill was filed on January 10th, 1929.

Q. So that those conversation you had with Mr. Kelly relative to staying a hundred per cent, as you put it, Atlantic, was all subsequent to the start of this litigation?

A. Yes, sir.

20

Q. That is, except the first one?

A. Except the first one.

Q. And you say that Mr. Kelly's only reply to your discussion of the matter was that he was willing to go on selling the Atlantic product provided he got the full rebate?

A. Yes, sir.

Q. But was not willing to discontinue the sale of the other competitive gasolines?

A. He refused to discontinue the other products.

30 Q. Counsel in his opening suggested that you had delivered gasoline in wagons had contained fuel oil; was that a fact?

A. Yes, sir.

Q. Now, did that in any wise interfere with the product of the gasoline?

A. Absolutely not a bit. Fuel oil deliveries are made in the afternoons and our wagons are allowed

to stand over night so all the oil drains down to the bottom, and we only handle a light gravity oil.

Mr. McGee: I object to this man testifying as an expert unless he qualifies him as such in answer to the Senator's question.

The Court: He is testifying now as to the facts.

Mr. Richards: Not qualifying as an expert, only 10
what we do.

A. Our fuel oil deliveries, which is a light grade of fuel oil, is made in the afternoon, and wagons allowed to stand over night, the oil drains down to the bottom of the wagon, and the morning, before we start our gasoline deliveries, we put gasoline into that wagon, back it back and forward and clean the compartments out thoroughly with gasoline. We drain that gasoline from the wagon, and we use that 20
gasoline for cleaning about our pumps and wagons, so when we put gasoline in that wagon it is just as clean as though it never had any fuel oil in there, thoroughly washed.

Q. Did Mr. Kelly ever complain to you about the delivery of the gasoline in the fuel oil wagons?

A. No, sir.

Q. Did you ever hear of any complaints from him?

A. Never had a complaint along that score. 30

Q. Is there any difference in the color between Atlantic gas and some of the competitors?

A. There is quite some difference, the competitors are coloring their gasoline quite a bit now. Our gasoline probably has an amber color to it, which is the natural color of the gasoline as we produce

it, not due to any contamination, but it is an amber color.

Q. While some of the gasolines are made —

A. Some gasolines are water wave. Ours used to be when we got up to the point where we had to overcome the detonation and due to certain processes we have an amber color and we can't very well overcome that.

10 Q. Some of the other gasolines are colored, however, yellow?

A. Some are colored with dye, yes, sir, aniline dye, yes, sir.

Cross-examination.

By Mr. McGee:

20 Q. Mr. Cox, I show you a contract, what purports to be a contract, marked Exhibit C3, and ask you in whose custody this has been since its execution?

A. It has been in two or three hands, it was in the —

Q. If you know.

A. It was in the hands of our Philadelphia office after Mr. Kelly signed it, and then we left it with a notary for a notary's seal, and then it was in Mr. Endicott's hands, and then it went back to our Philadelphia office, and then from the Philadelphia office

30 to Mr. Endicott.

Q. What do you mean, "we left it with a notary?"

A. Turned it over to a notary to acknowledge his seal.

Q. To get his seal?

A. Get his acknowledgment of the notary.

Q. Why did you do that?

Mr. Richards: I object. It is immaterial, if your Honor please.

Mr. McGee: If the Court please ——

Mr. Richards: We have specifically said, if your Honor please, that we are not relying upon these acknowledgments, they are not part of the contract, and the contract did not have to be acknowledged, and we frankly stated that the acknowledgment is unquestionably irregular and it is not any part of our case. 10

Mr. McGee: If the Court please, my purpose in asking this question is only for one reason, and only to indicate or attempt to show the Court the attitude of the Atlantic Refining Company with their service station operators, or with the defendants, and I contend that this is a material matter, something that is important to our case, and that we should know why this man has a right to attach anything to an instrument that was executed by my clients, and what was the purpose of it, and why he did it, and I respectfully submit that we are within our rights in demanding that, and in order to show we are, we have a more serious contention here in this altercation to prove to the Court, if possible, that these people handle these contracts carelessly, and as they desire, and made changes and added to and pasted papers on and everything else, just in shipshape which would satisfy their whims and ideas, and contractual relations, if you will. 20 30

The Court: I sustain the objection.

Q. Who was present at the time this paper was executed?

A. Mr. Louis Kelly, myself, his father and his brother.

Q. Is that all?

A. That is all that I recall, sir.

Q. Was the notary public present?

A. No, sir.

10 Mr. Richards: That is objected to, if your Honor please.

The Court: Sustain the objection.

Mr. Richards: I might add, if your Honor please, the making of the contract is admitted.

The Court: Yes. That doesn't prevent cross-examination upon it, however.

20 Q. I understood you to say that this paragraph which I refer to in Exhibit C3, which reads as follows: "In consideration of the investment required it is agreed that the above location shall be used only for the sale of Atlantic gasoline and motor oils," was to your knowledge or not to your knowledge in this contract?

A. Definitely to my knowledge in the contract because that was the hardest thing I had.

Q. Did you sign this contract?

30 A. I did not, but I took it down and had it signed and read it over with Mr. Kelly before he signed it.

Q. You read it over with Mr. Kelly before he signed it?

A. Yes, sir.

Q. Who else did you read it to, who do you refer to as Mr. Kelly?

A. Mr. Louis Kelly.

Q. In your affidavit you stated that attached to the bill of complaint is a correct copy of the contract which was entered into, is that correct?

A. Yes, sir.

Q. Was it a correct copy of the contract that was entered into?

A. It should have been a correct copy.

Q. I say was it?

A. I don't have the copy, sir, to tell you. If I could see the copy. 10

Q. I show you agreement, kindly look over that agreement and let me know whether that was a correct copy.

A. I would hesitate to say without comparing this carefully with the original.

Q. I say is that the correct copy of it? Want to see the original?

A. I would like to.

Mr. Richards: If your Honor please, we can save a lot of time if counsel will indicate where he considers the discrepancy, take some time to read it. 20

The Court: Yes, the Court can't take the time I think for that, if there is any discrepancy.

Mr. McGee: If the Court please, my question can be answered in another way, if I indicate to the witness. 30

The Court: Why should the Court take the time?

Mr. McGee: Then, if the Court please, referring to the seventh page of the complainant's bill, I will ask you whether or not that is part of the contract that was entered into, the lower part?

A. They wanted —

The Court: The question is overruled. It is manifest that it is not and counsel has so stated.

Mr. McGee: If the Court please, I am endeavoring here to get the man to testify, or, rather, as an affidavit —

10 The Court: The fact remains that it is not necessary to have the witness testify to that. You may argue on it because it is the fact, it is the manifest fact.

Q. Mr. Cox, you testified that considerable money was spent on this property of the defendants, located at Delevan, northeast corner Delevan and Ventnor Avenues; did you not?

20 A. Yes, sir.

Q. How did you know this money was spent?

A. Because our mechanical department is required to give us a report and we have to pay the mechanical department as we would an outside contractor.

Q. Do you know that of your own personal knowledge?

A. My own personal knowledge, I know the mechanical department gave us a bill for a certain amount of money, amounting to \$2500.

30 Q. Where is the bill the department gave you?

A. In the file Mr. Endicott has. You like to see the summary or each individual bill?

Q. Like to see the bill referring to all work that was done at the Kelly service station.

A. Here it is, sir.

Q. Referring to bill entitled, "Installing curb to station at Margate, New Jersey, Philadelphia and

Suburban Department, B. M., South New Jersey credit from the station at Ventnor and Delevan Avenue, for Louis and Jack Kelly, authorization No. 3727," and ask you to show me the particular item which refers to the driveway and state the amount.

A. Installation for service station, cinders \$275. Station driveway for service station, cinders 2086, \$275. That was our cinder driveway that we first put in, which we later took up with a concrete driveway, took the cinder driveway out. See if I can find 10 the concrete driveway for you. We didn't put the additional cost in on concreting, let it go at \$275, but there was an additional cost —

Q. Does it appear on that statement?

A. There is an additional cost we paid Colbride the sum of, here is the bill from Mr. Colbride, installing cement approach and island, \$215, more than that, 200 feet, William Colbride, 200 North Union Avenue, \$215.

Q. What part of it, if any, was paid by the 20 Kellys?

A. Half of that was repaid by Kelly. We paid the original amount.

Q. Of how much money?

A. Now, I don't have the figures on Mr. Kelly's account here. I couldn't say off-hand truthfully how much he actually did pay us, but the agreement was Mr. Kelly was to pay us back one-half. We paid the total amount, Mr. Kelly paid us back one-half.

Q. Mr. Cox, didn't you testify that you were fa- 30 miliar with the total installation at the northwest corner Delevan and Ventnor Avenues?

A. As far as —

Q. Which is known as the Kelly service station?

A. Yes, sir.

Q. Why can't you tell us, then?

A. Because I don't have all the books of record which our company has, I don't have Mr. Kelly's account in front of me.

Q. Is there some one here who can testify to that?

A. Not that I know of.

Q. You don't know, then who this driveway belongs to, do you?

A. Yes, I do, because here is our bill showing we put it in.

10 Q. Did you secure that bill from Mr. Colbride?

A. We also paid Mr. Colbride the check.

Q. And paid him the check?

A. Yes, sir.

Q. And then your company gave credit to the defendants for the particular amount on account of the driveway?

A. Account of the driveway he paid us back, yes, sir.

20 Q. Then you don't own the entire driveway, is that correct?

A. We put in the entire driveway and he had paid us back half of it.

Q. Then do you own the entire driveway or don't you?

Mr. Richards: I object to it.

The Court: Sustain the objection. The contract calls for installing a cinder driveway which has
30 been done.

Mr. McGee: If the Court please, the bill, however, is this curb as part of their —

The Court: That wasn't the testimony. The testimony was the \$215 was not added to it. The wit-

ness has just testified to that fact, that the 215 concrete was not added and did not constitute a part of the amount he has testified to.

Mr. McGee: As I understand the replies, the witness has testified that there was two hundred and some dollars paid for concrete driveway of which the Kellys paid one-half.

The Court: Yes.

10

Mr. McGee: Therefore, I am endeavoring to elicit from this witness whether or not this driveway was paid for entirely by them.

The Court: It has nothing to do with this case at all, as I see it.

Mr. McGee: If the Court please, in the bill, however, they say one of the reasons is that we are driving over their driveway, which we paid for. 20

The Court: Which is the cinder driveway of \$275 which was paid there. Of course if you put something else over it, that doesn't change that situation at all.

Q. Mr. Cox, you talked to Mr. Kelly, Louis Kelly, several times, did you not?

A. Yes, sir.

30

Q. And you talked to him a number of times between December and February, 1928?

A. Yes, sir.

Q. Now, do you say that Mr. Kelly never complained about the quality of the gasoline?

A. I don't say he never complained. I say he did

complain at one time from a detonation standpoint. We took the gasoline out and got one of Mr. Kelly's customers back to him and he said, "It is all right, we got our customers back, it is the best gasoline on the market."

Q. When was that?

A. At the time Mr. Kelly made the complaint to us. I don't have a written complaint at the time, an oral complaint, I don't have it on record.

10 Q. Mr. Cox, you are familiar with the gallonage, aren't you, of that station?

A. Yes, sir.

Q. What was the gallonage?

A. If I may be permitted to have a card there, I will tell you exactly whatever date you would like to know up to the date he split. What date would you like to know?

Q. From the opening until October.

A. That would be quite a computation, to take an
20 adding machine.

Q. Haven't you a total?

A. I have a total for the year 1928, 80,088 gallons.

Q. Do you have it by months?

A. By months, would you like to have your average —

Mr. Richards: What is the purpose of it?

30 The Court: I would like to hear.

Mr. McGee: If the Court please, the purpose of it is to show that by our gallonage, what was disposed of, that the number of gallons were still getting smaller during the busiest months.

A. On the contrary, we show an increase —

Mr. McGee: And therefore Mr. Kelly made the complaints, which we contend that we sent to the Atlantic Refining through their agent.

Mr. Richards: I object to it, then, if that is the purpose of it, not to the complaint, but to the idea that there can be any evidential value to the fact that the amount sold got less every month, might be due to any number of causes.

10

The Court: I will permit the question.

Mr. Richards: If your Honor please, let me point out to you that there is some evidence here of a competitor having arrived on the scene, which may have some reason to do with it.

The Court: Yes, that has more weight in the weight of the testimony. I will admit it.

20

A. February when he first started business he had 1767 gallons. March, 8939. April, 5185. May, 9454. June, 7525. July, 11,651. August, 10,771. September, 9000. October, 7044. That is the Ethyl. That was straight gasoline, and add to that Ethyl for August, I gave you the figure on straight gasoline, 10,771, is Ethyl gasoline for the month of August, was 1330 gallons. September, 961 gallons. October, straight gasoline, 7044; Ethyl gasoline, 190. I failed to give you the Ethyl gasoline gallonage in February. Would you also like to have that?

30

Q. No.

A. Then we may go on to in November, 5278; December, 5463. January, 2056, the winter months; February, 1650; March—of course, the breach occurred in January where the competitive equipment

went in, and then Mr. Kelly ceased buying from us, and our gallonage showed a marked decline.

Q. We are not interested in that.

Mr. Richards: I know you are not, but you are going to get it.

The Court: The bill was filed at that time. The question is now answered. You have given January
10 ary.

Q. Mr. Cox, did you and Mr. Stone talk to Mr. Kelly?

A. Yes.

Q. When?

A. At various times, I would say three or four different times when Mr. Stone was in the neighborhood.

20 Q. When did Mr. Stone and you talk to Mr. Kelly?

A. I am sorry I couldn't give the exact date.

Q. Was it in April?

A. I wouldn't be able to tell. Mr. Stone is in and out of this territory.

Q. Did you talk to Mr. Kelly?

A. Did I talk to Mr. Kelly?

Q. Yes.

A. In April?

Q. Yes.

A. Undoubtedly I did, yes, sir.

30 Q. What was the conversation about?

A. That would be rather hard to remember, from April.

Q. Did he complain to you about the gasoline then, his sales and quality?

A. April?

Q. Yes.

A. I couldn't say offhand, but he possibly did and possible did not. We get complaints.

Q. You wouldn't say he did talk to you about the quality then?

A. At one time he spoke to me about the non-de-tonation gasoline.

Q. That is the quality, isn't it?

A. That is quality.

Q. He did talk to you about quality?

A. That is altogether possible, customers con- 10
stantly do that.

Q. Did you see him in May?

A. Yes, I would say I did, in fact, I testified I saw him about every two weeks.

Q. You saw him every two weeks?

A. About, I say.

Q. Was the conversation the same as it was on the first occasion?

A. Rather hard to remember conversation that far back, I couldn't do it truthfully. 20

Q. Did you converse with him in August?

A. I would say I did, yes, sir.

Q. Was there any complaints then about the qual-
ity?

A. As I said, it is rather hard for me to remember when the complaint about the quality exactly, because customers are constantly questioned and they are constantly talking about quality.

Q. You have remembered everything else very minutely. 30

A. Backed up by documentary evidence, yes, sir.

Q. Refresh your memory and try to remember some of these conversations.

A. I would like to, sir.

Q. You secured jars, did you, ever examine this gasoline?

A. At one time I did, yes, sir.

Q. Did you take gasoline from the —

A. I certainly did, yes, sir.

Q. That was because of quality?

A. That was because of a detonation question which Mr. Kelly brought up.

Q. That is quality, isn't it?

A. That is quality, yes, sir.

Q. What did you do with those jars?

A. Took them to Philadelphia to be tested.

10 Q. Were they tested?

A. No, sir.

Q. Did you tell Mr. Kelly they were not tested?

A. Mr. Kelly asked us not to test the gasoline because he got his customer back.

Q. Asked you not to?

A. Not to test the gasoline because he got his customer back. We were attempting to co-operate with Mr. Kelly —

Q. Who was the customer?

20 A. I don't recall.

Mr. Richards: If your Honor please, the answer was not completed.

The Court: Yes.

30 A. We were attempting to co-operate with Mr. Kelly and we do with every one of our dealers where there is any question raised in quality, we immediately go after that in quality, take the sample of gasoline, go out and see the customer, get the complaint directly from the customer, and that is our duty because of our competitors, to go see these customers direct.

Q. Who did you see?

A. I didn't see the man. I don't recall who he was.

Q. Who talked to him?

A. Mr. Motter talked to him.

Q. Who is he?

A. He is a salesman that was down here at that time.

Q. For how long?

A. Down here for about four months, I think, or six months.

Q. Mr. Cox, did you discontinue the half cent margin discount? 10

A. Along with all the other customers we —

Q. I say did you discontinue it?

A. We discontinued it, yes, sir.

Q. When did you discontinue it?

A. Not able to give you the exact date.

Q. You had a conversation with Mr. Kelly about the amount of two cents under tank wagon, and a half a cent?

A. I beg pardon, if you will permit me to answer your question previously, I can give you the exact date, because Mr. Kelly only got that discount in August, 1928. 20

Q. Only received what discount are you referring to?

A. A half a cent.

Q. In August, 1928?

A. That was the last half cent we gave Mr. Kelly.

Q. What did you discontinue, if anything, in May, 1928?

A. What was your question? 30

Q. What discount, if any, did you discontinue, in May, 1928?

A. Why, looking at this card, it looks possibly as though we discontinued that in May.

Q. Who made those cards?

A. These cards are made up by a bookkeeper in the office.

Q. You don't know anything about those cards?

A. I told you I wasn't able to give you the figures without knowing something about it.

Q. You didn't make them up?

A. No.

Q. Did you give it to the bookkeeper?

A. They are made from the tickets.

Q. Did you hand the tickets to the bookkeeper?

A. No, I have seen her take them.

10 Q. Did you see the bookkeeper take these actual tickets?

A. No, but that is the bookkeeper's job.

Q. But you don't know whether this is correct or not?

A. Yes, that is correct.

Q. Mr. Cox, if you were not there and you didn't hand the tickets and you didn't see this man write this, and you don't know whether or not he took the right tickets or not, how can you say that these are
20 correct?

A. Because the amount is cross-checked on that work and we have the tickets here that she can prove this.

Q. How do you know?

A. We have the tickets here. Can prove these figures.

Q. Did you cross-check them?

A. No, but they have been cross-checked.

Q. Somebody else cross-checked?

30 A. Somebody else cross-checked the figures.

Mr. McGee: I object to any further reference to that.

The Court: Yes, you are the one that has been using it. Nobody else has used it, Mr. McGee.

Q. Now, Mr. Cox, would you say that the half cent discount was or was not discontinued in May, 1928?

A. I will, yes—it was discontinued, but the exact date I am afraid I am not able to give you.

Q. Will you say it was not May?

A. I say I couldn't tell what date it was discontinued.

Q. You don't know?

A. I don't know.

Q. It may have been May, however, 1928? 10

A. I don't know, sir.

Q. Did you talk to Mr. Kelly when this discount was discontinued, the half cent I am referring to?

A. Undoubtedly I did.

Q. Mr. Cox, do you remember talking to him?

A. I remember talking to Mr. Kelly on several occasions. You see we did business over a period of two years, and I can't place the definite dates.

Q. Mr. Cox, wasn't this an important visit when you came to tell a man that you were going to dis- 20
continue a half cent discount?

A. Our prices are constantly changing. We don't have to tell our customers we are changing prices.

Q. That is the first time that it had changed from the institution of the agreement, wasn't it, with them?

A. I wouldn't be prepared to say that that was the first time that the price changed since we executed the agreement with them. May, you say?

Q. Didn't you talk to Mr. Kelly on the avenue? 30

A. You say in May what year?

Q. 1928.

A. No, that wasn't the first time the price had changed.

Q. As to the half cent discount for the consumption of 10,000 gallons in any one month?

A. Just when that was discontinued I don't know, sir; I have stated that.

Q. What is the paper you are referring to?

A. That is just a little slip of note paper. Would you like to see it? (Handing paper to counsel.)

Q. You testified that hundred per cent dealers, or dealers that did not do a split business, secured two cents margin on this tank wagon, is that correct?

A. Yes, sir.

10 Q. And still continue to?

A. Still continue to, yes, sir.

Q. And has since January, 1928?

A. Yes, sir.

Q. Or February, 1928?

A. Well, since January, since we have been down here.

Q. Did your company allow the discount of two cents in October, 1928?

20 A. Two hundred per cent dealers we are still allowing it, sir, and always have allowed it ever since we came down here.

Q. Did you to the Kellys in October, 1928?

A. Kelly's figures have been juggled around a little bit. I would be unable to say.

Q. Who juggled them?

A. I don't know. When we sent a green tank wagon driver down there, Mr. Kelly induced him to give the two cents.

Q. How do you know that?

30 A. Because the checks came through hundred per cent, checked up in the office.

Q. How do you know Mr. Kelly said anything to him?

A. Drivers told us.

Q. You were not there?

A. I wasn't there. I can't say definitely I know he did; but the figures were put through as a hun-

dred per cent, then the correction was made and letter sent to Mr. Kelly.

Q. Then you are just surmising what the driver told you was in the presence of Mr. Kelly?

A. I am not surmising, except the error was made and corrected by us.

Q. It wasn't told you by Mr. Kelly, was it?

Mr. Richards: I object to counsel arguing with the witness about something he brought out himself, 10 not a part of the direct examination at all.

The Court: Sustain the objection.

Q. Mr. Cox, you testified that all the Atlantic products were sold up to and including December of 1928, nothing but Atlantic products?

A. Mr. Kelly had—I did testify to that, yes, sir.

Q. I just asked if you testified to that.

A. Yes, sir.

20

Q. Was that a fact?

A. Mr. Kelly had a barrel of competitive oil which he agreed to get rid of as soon as it was sold out.

Q. What was that?

A. Competitive oil, was Invader, he agreed to get rid of that when it was sold out, but you have been over that, I had forgotten about that at the time. I said, however, he had that in there and agreed to get rid of it when he sold it out.

Q. When you and Mr. Kelly appeared at the Kelly 30 place, was that Invader on sale?

A. It would be hard to see in there, in fact, possibly in the back somewheres.

Q. Where had it been?

A. When I first did business with Mr. Kelly it was in the service station across the street.

- Q. Didn't you ever see it?
- A. Sure I saw it then. That is when he agreed to get rid of it.
- Q. At the northeast corner, the present location?
- A. I saw his drum in the back of the building.
- Q. Did you say anything to Mr. Kelly about that drum?
- A. He agreed to get rid of it.
- Q. Didn't you say to him that it is all right to
10 have that here?
- A. No, sir.
- Q. When did you first know that Mr. Kelly was changing from your products to some one else's, making it a split station?
- A. Just before Christmas, 1928, about December 23rd or 24th.
- Q. Was this discount discontinued prior to December, 1928?
- A. May I ask to which discount you are referring?
- 20 Q. Two cents and the half cent?
- A. The two cents was, I mean the half cent was.
- Q. Why was that discontinued?
- A. Because of competitive conditions. In other words, we are forced to make down here, to make money, we have always given Mr. Kelly more than the contract called for.
- Q. Didn't you have an arrangement with Mr. Kelly to hold the one-half cent?
- A. No, the only arrangement we had was our con-
30 tract, tank wagon price.
- Q. Didn't Mr. Kelly ever talk to you about a half cent on any value of ten thousand sold?
- A. Sure, we gave that to him.
- Q. Did he ask you for it?
- A. We gave it to him.
- Q. Did he ask you for it?

A. Sure he asked us for it, he asked us for a lot more.

Q. And you agreed to give it to him?

A. We never agreed to.

Q. You gave it to him?

A. We gave it to him.

Q. And he asked you for it?

A. Not the beginning he didn't ask for it. We gave it to him, and then when we cut it off he asked for it.

10

Q. Didn't he ask for it when you first started?

A. No, we gave it to him ourselves, and he took the tank wagon price to dealers and we gave more than that.

Q. In other words, he didn't say anything to you about the half cent discount?

A. When we gave it to him.

Q. And you discussed it with him?

A. Yes.

Q. You gave it to him as a new dealer?

20

A. Yes, sir.

Q. Didn't he ask for it?

A. No, we gave it to him.

Q. Didn't he ask for it in the beginning?

A. No, we offered it to him. We gave it to him.

Q. And you didn't agree to give it to him?

A. I say we gave it to him. We told him, "You are going to get it."

Q. Did he ask for it prior to that time?

A. No.

30

Q. Would you say that the two cents discount was not discontinued prior to December, 1928?

A. Two cent discount was not discontinued, not officially, no, sir, unless there was an error in billing which was recently corrected, Mr. Kelly got two cents off the tank wagon.

Q. Did you say there was a change recently corrected?

A. I say unless there was an error in billing which was recently corrected.

Q. You say there was a bill recently corrected to Mr. Kelly?

A. No, but there is a possibility, there is a balance in Mr. Kelly's account now due to irregularities in that account, possibly an error in billing.

10 Q. Whose irregularities?

A. Possibly the bookkeeper handling the account.

Q. What caused that, do you know?

A. Well, we are handling hundreds of accounts all over the United States, different markets have different prices, different dealers have different prices, they are split, hundred per cent, and the possibility of error is great.

Q. Do you have trouble with all the accounts?

20 A. We don't have trouble, I wouldn't say that. We are always able to put the credit there or charge, either one. We don't have trouble, not always able to pick the error up, if we owe him money we put the credit there, if he owes us we go around and explain him on such and such a date the price was such, and we usually collect it, unless a customer becomes obstinate and says, "I have got it, I am going to keep it."

Q. Mr. Cox, how many tank trucks did you have in 1928?

30 A. I hesitate to answer because it is hard to tell. We started with one wagon.

Q. That is in Atlantic City?

A. We started with one wagon and when we added two, we are now operating four, and I don't know the date those wagons came down.

Q. Would you say you had more than one?

A. It was two or three, possibly, because we are running wagons out of Philadelphia, see.

Q. Then more, because if you had one, you made more than one delivery of gasoline a day, didn't you?

A. From where?

Q. From your plant to various service stations?

A. When our plant was completed and whether we had a plant down here, I don't know whether we had December, 1928.

10

Q. I say you made more than one delivery of gasoline a day?

A. No, when we started business here, we made one delivery a day.

Q. Who to?

A. Mrs. Seeler, 3800 Atlantic Avenue.

Q. When was that?

A. That was prior to December.

Q. Well, in 1928 were you still making one delivery a day?

20

A. In 1928 some days we made one delivery a day, yes, sir, down here.

Q. How many customers did you have?

A. We started with one.

Q. Started with one?

A. Yes.

Q. How many did you have in 1928?

A. End of 1928?

Mr. Richards: I object, if your Honor please. I can't see the importance. I 30

The Court: Sustain the objection.

Q. Mr. Cox, you testified that you let the fuel oil trucks remain over night with kerosene in it, with

gasoline in, washing out the fuel oil; is that correct?

A. I beg pardon, I didn't testify to that.

Q. What did you say?

A. I said we allowed the truck to stand over night.

Q. After it had been cleaned?

A. No, sir.

Q. Just left it stand?

A. Yes, sir.

10 Q. As you would any time at all?

A. Yes, sir.

Q. When was it cleaned?

A. In the morning before your gasoline delivery was made, it came to that after 1928, we were not selling fuel oil down here before some time in December.

Q. What were you referring to, the truck standing over night?

20 A. That is our usual procedure when we deliver fuel oil with the gasoline, in the same truck, it is often done in an out-of-the-way point where we are beginning an account, starting to take out gasoline with fuel oil.

Q. As I understand you to say, you leave your truck stand over night?

A. If we deliver the fuel oil, that is our instructions, and that is what happened.

Q. Do you know whether that happened or not?

30 A. Offhand in December, 1928, I would hesitate to say whether that happened or did not happen.

Q. Did you supervise that?

A. No, I wouldn't be there to watch the truck.

Q. You don't know whether it was done or not, do you?

A. If the gasoline was delivered it was done, but we were not delivering in 1928.

Q. Now, Mr. Cox, do you know personally whether

or not these tanks were washed, the trucks or tanks of the trucks?

A. If you mean did I see them washed?

Q. That is just what I mean?

A. Sometimes I have seen the trucks washed, but whether I saw a truck washed in December, 1928, or not, I am seeing them washed every day, I couldn't say.

Q. It is possible, then, that they could not have been washed?

10

A. That is rather impossible because our drivers here can testify, man had charge of trucks.

Q. As far as you are concerned, it is possible?

A. If I didn't see them washed, the possibility that they were unwashed, is that it?

Q. That is right.

A. It may have been.

Q. When you saw this other company's tank being erected on the lot adjacent to the Kelly service station, Delevan and Ventnor Avenue, you talked to Mr. Kelly?

20

A. Yes, sir.

Q. Did he tell you that he was having trouble with gallonage in disposing of your gas?

A. No, sir.

Q. Did he tell you that he was having trouble with the quality of it, detonation, as you call it?

A. Not on that day, no, sir.

Q. Did he tell you that the gas was dirty?

A. No, sir, he never complained that the gas was dirty.

30

Q. Did he tell you anything about carrying it in fuel oil trucks?

A. Never complained of that to us.

Q. What did he say to you?

A. At that time?

Q. Yes.

A. That he was going to put it in, and that is all there was to it, and he could find a loophole in the contract and he would find it.

Q. Is that all he said?

A. That is all he said, there was no need discussing it further.

Q. Did you have any conversation about other companies' gasoline prior to that time with Mr. Kelly, Mr. Louis Kelly?

10 A. He was thinking of putting in a non-branded gasoline, said that the dealers had been around to see him, but that he had thought better of it.

Q. When was that?

A. That was prior to December.

Q. When?

A. Exact date I couldn't give you.

Q. That is all that was said?

A. That is all that was said, he wasn't going to put it in, he never gave me any intimation he was going to put in Tidewater until I happened to be driving by and saw the pump.

20

Q. Did he ever talk to you again about any other company's gasoline?

A. No, I don't recall he ever did.

Q. Never said anything?

A. Simply put it in.

Q. That consisted of all the conversations you had with him relative to other companies' products, competitive companies' products?

30 A. I would hesitate to testify to that whether over a period of two years talking with a man he may have mentioned a gasoline another time. I don't recall it.

Q. So far as you can testify now?

A. I don't recall it.

Q. You don't recall?

A. No.

Q. You wouldn't say he didn't have any other conversation?

A. I don't recall.

Q. When was it, Mr. Cox, this conversation took place that you said that the other salesman was a nice fellow?

A. I said that prior to December when he put in the competitive equipment.

Q. Who was this nice fellow?

A. A man by the name of Joy, I believe. I didn't 10 know him myself.

Q. When do you say this conversation took place?

A. Prior to the institution of this pump, he said this man had been around to see him, he was a nice man, but he thought better of it.

Q. Is that a non-branded gas Mr. Joy was selling?

A. It is not a non-branded gas.

Q. Didn't you just say that the only conversation you had prior to December was about a non- 20 branded gas?

A. No, that is the very thing I wouldn't say because I wasn't sure of it. I said over a period, of course, of two years in conversing with the customer he may have mentioned many gasolines, but I couldn't recall definitely.

By Mr. Richards:

Q. Mr. Cox, I just want to get this one-half cent 30 business clear. Will you explain to the Court what this allowance of one-half cent was?

A. Yes, the situation was this, Mr. Kelly was new down here, starting in with our contract, we contract with Mr. Kelly to sell at the tank wagon price, but we feared with a new product Mr. Kelly's gallonage

might be low, so to help Mr. Kelly along we offered him over and above his contract an additional half cent as an additional inducement to Mr. Kelly to get out and work and push that gasoline.

Q. Was that a modification of the contract?

A. That was no modification of the contract, we gratuitously got nothing out of that. Said, "You got a hard row here, and we feel you are entitled to a little more."

10 Q. It has been referred to one-half per cent. Is that one-half per cent?

A. No, it was one-half cent.

Q. One-half cent a gallon?

A. Yes, sir.

Q. Were you giving that to other dealers as well?

A. Yes, we had one other dealer at the time we were giving that to.

20 Q. Now, when did you discontinue, I think you couldn't tell us the exact date?

A. The exact date I couldn't say.

Q. Why did you discontinue the one-half cent?

A. We saw our dealers were doing very good and as good as competitive dealers, didn't need our one-half cent, they were going on right ahead on the quality of the product.

Q. So at the time you withdrew this, did you withdraw it from any other dealers?

30 A. Yes, we always cut all our dealers in line, and do not discriminate.

Q. So there was no discrimination?

A. Absolutely not.

Q. You gave the one-half cent at the time you gave it to the other dealers?

A. Yes, sir.

Q. And took it away when you took it away from the other dealers?

A. Exactly the same date.

Q. The other dealers, did they have contracts of a somewhat similar nature?

A. Similar contract, yes.

Q. Similar contract to this?

A. Yes, sir.

Q. Now, you said something about the price of the gasoline fluctuating?

A. Yes, sir.

Q. You mean the wholesale price changes from 10 time to time?

A. Yes, sir.

Q. Suddenly?

A. We are notified of it very suddenly sometimes, yes, sir.

Q. And it goes into effect immediately?

A. Immediately.

Q. That is done for what reason?

A. Well, sometimes conditions, can't tell just what competitor may come in so far as my opportunities, 20 we have met them, our Philadelphia office may call me at home, eight o'clock, say, "Tomorrow morning sell a cent lower," our market price changes due to competitive conditions.

Q. You did say, didn't you, on occasions Mr. Kelly got too much of a rebate?

A. Yes, sir.

Q. And did you also state that you requested him to repay the money that he had so received and he had refused to do so?

30

A. That is right.

Mr. Richards: I call for production of original of letter of August 21st, 1929.

Mr. McGee: I don't believe we have that.

Q. I show you a copy of a letter marked "Atlantic Refining Company," under date of August 21st, 1929, this signed apparently by the credit manager, who is he?

A. Mr. Snay.

Q. Where is he located?

A. Philadelphia.

Q. Could you tell me whether or not this letter refers to such an overcharge or under charge, rather?

10 A. This is an undercharge, gave him a cent too much, billed same as a hundred per cent, new driver went down on the job and made a mistake on his tank wagon ticket, putting the price on it, but all those things, as I say, are taken and picked up in the office and later corrected.

Q. Now, the system—you object to leading the witness, I am only doing it for the purpose of getting it in short, but if you object to it, say so—the system of accounting was apparently to have an original slip made out by the driver and signed by the purchaser, which slip is apparently sent your book-keeping headquarters and there transferred to your regular system of books, is that correct?

20

A. Correct.

Q. Now, I show you three such slips under date of July 12, 1929, July 24th, 1929, and July 31st, 1929. These are all headed Sold to Kelly Service Station, and I show you under July 12th, 234 gallons of Ethyl gas, and then the price is marked 15 plus 2, Atlantic gasoline same date, 280 gallons, 12 plus 2, on the 24th, 205 gallons Ethyl at 15 plus 2, Atlantic, 190 gallons at 12 plus 2, on the 31st 190 Ethyl, 15 plus 2, Atlantic gas, 290 gallons, 12 plus 2, and I call your attention to this letter of August 21st —

30

Mr. McGee: May I object just a minute? Was that in the form of a question, Senator?

Mr. Richards: So far it has been, yes.

Mr. McGee: And you haven't been reading?

Mr. Richards: Yes, I called to his attention —

Q. —addressed to Kelly Service Station in which they speak of an error in collecting for our deliveries of July 12th, 24th and 31st, amounting to \$13.84, and asking for remittance covering that. 10
Now, what I want to know is whether or not these three slips do show an error in the amount charged?

A. Yes, sir. May I explain it?

Q. Yes.

A. On your straight gasoline your tank wagon price today is 14 cents, that is the tank wagon price which we agreed to sell. We give our hundred per cent dealers two off of that, and then there is a two cent tax, 14 cents less 2 would bring it down to 12 for hundred per cent dealers, and then two on that would bring it up to 14 cents hundred per cent dealers would pay. Mr. Kelly has been charged 14 cents, the same price as the hundred per cent dealer. His bill should have been 14 minus 1, which would bring to 13, then your 2 cent tax, which would make him 15 instead of fourteen. Therefore, shows an error of a cent a gallon which Mr. Kelly owes us. It is entirely possible sometime previously we have made a mistake the other way, as I see there is a balance in Mr. Kelly's account now due to minor things that might have arisen like that, but we always show the dealer with these tickets the actual delivery and explain to him and straighten it out. 20 30

Q. So that on this whole bunch of deliveries there is an error of one cent on these three days?

A. One cent, he was billed a cent less.

Q. And that he was requested to pay that?

A. Yes, sir.

Q. Do you know whether he did pay it or not?

A. He refused to pay it.

By Mr. McGee:

Q. How do you know there were errors in those slips?

10 A. I just seen the price and I know the market price today.

Q. Today?

A. Yes, sir.

Q. These slips don't refer to today, do they?

A. No, but I knew the market price at that time.

Those slips were a few weeks ago.

Q. What was the market price at that time?

A. Tank wagon 14 in July.

Q. Who sets that?

20 A. Market price is set by competitive conditions in the territory. We have to meet our competitors in the territory, if the competitor drops his price sometimes we have to drop ours to meet him. As a rule we have to because he would take our business if we didn't.

Q. Is Kelly's the only people on which you would have made that, as you say, the correct charge to them?

30 A. No, all our hundred per cent dealers would have been charged that way, but Mr. Kelly, being a split dealer, was charged the other way.

Q. Are there any other split dealers?

A. Yes, sir, quite a few.

Q. There are quite a few?

A. Yes, sir, one right across the street from Mr. Kelly.

Q. And you charge them just the same?

A. Pay 15 cents unless it is in error, and in that case it is corrected, and we do the very same thing we did with Mr. Kelly.

Q. Do you do that all over your district?

A. All over this district, yes, sir.

Q. All over this district?

A. Yes, sir. Sometimes it may take months to pick an error up, may be a delivery and wait six months before an auditor goes over the books and finds a mistake, \$1.05, he will pick that up and fellow get a letter six months later. 10

Q. You did that with Mr. Hensel?

A. We did that with Mr. Hensel. He is paying a split business price today.

Q. In other words, he is paying, how much would he have paid in July, 1929?

A. That is a question finding out what the tank wagon price was in July, 1929.

Q. Your tank wagon price has not varied so much this summer, has it? 20

A. July, 1929?

Q. Yes, it has not varied very much, has it?

A. Mr. Hensel should have been paying 15 cents for straight gasoline in July unless there was an error.

Q. Well, have you made errors in his account also?

A. I distinctly remember one error in Mr. Hensel's account where I sent the driver back to collect the money so the thing wouldn't have to go through the bookkeeping. 30

Q. Then you have had errors in all your accounts?

A. I wouldn't say that, sir. We have thousands of accounts.

Q. Do you have errors in Mr. Murtland's account, Delevan and Atlantic Avenue?

A. Whether there was an error or whether there was an adjustment to be made in that account is hard to say. Mr. Murtland is unsatisfactory in the account, possibly he can show lots of things.

Q. Mr. Murtland was not unsatisfactory back in January, was he?

A. No, but he wanted more money for his gasoline at that time.

Q. You say he was unsatisfactory?

10 A. No, but he wanted more money for his gasoline at that time.

Q. In other words, it is difficult for you to tell whether a man should get on split business a certain discount or should not?

A. No, on the contrary it is absolutely definite, and I can show we have a record in our office which shows the Kelly Service Station split such and such a date, Absecon Garage Company, of which Mr. Murtland was a hundred per cent dealer, a hundred
20 per cent, he gets two cents off, Alfred Hensel, split business, we went in with Mr. Hensel on a split business agreement.

Q. Your driver has a list of those, doesn't he?

A. Not only our driver, our office has a list of those.

Q. Then your driver should know accordingly, shouldn't he?

A. He certainly should, and where he doesn't he is responsible, if we can't collect that money from
30 Mr. Kelly our driver made that mistake will have to pay us.

Q. Who was this driver, was it Mullin?

A. I will have to see the ticket. That ticket is dated 8th of December, and wagons at the time, not in the summer time, they operate out of Philadelphia. This man's name is Delphin and Harris, Del-

phin and Harris were the two drivers, both new drivers not in our employ down here.

Q. How long had they been with you?

A. That is hard for me to tell without looking up the personnel records.

Q. What was the color of your gasoline in 1928 from February to December?

A. That also would take an expert to tell you exactly what the color was. My recollection is it was an amber color, has been an amber color ever since 10 we put our new gasoline into effect at that time, before that it was a water wave.

Q. When was your new gasoline put into effect?

A. In 1928 some time.

Q. In May?

A. I couldn't tell you definitely, I would have to look up our records.

Q. You say it was water colored?

A. A water wave.

Q. Prior to the new gas?

20

A. Prior to the new gas, but I wouldn't say when the new gas went in.

Q. Your new gas was put in during the year, 1928?

A. Yes.

Q. He had a contract with you at that time, didn't he?

A. Mr. Kelly bought our new gasoline.

Mr. Richards: If your Honor please, he has gone 30 over this.

The Court: Not the color.

Mr. Richards: I object, because he is limited in his examination here to re-direct.

The Court: Technically that is so, but I will not stop the cross-examination for that point.

Q. Did you have any complaints from Mr. Kelly or any other dealer about your gasoline prior to the time that the new gasoline was put on the market by your company?

A. I never had any complaints, no, sir.

Q. You did not?

10 A. No, sir.

COMPLAINANT RESTS.

DEFENDANT'S TESTIMONY.

LOUIS KELLY, SWORN.

20 Direct examination.

By Mr. McGee:

Q. Mr. Kelly, what is your business?

A. Operating a service station.

Q. Where?

A. Northeast corner Delevan and Ventnor Avenue.

30 Q. Are you in business with anyone outside of yourself?

A. My brother Jack.

Q. Your brother Jack Kelly?

A. That is, we were not partners, he was working with —

The Court: I can't hear you.

A. The main—that has reference to my brother Jack, we were operating on the opposite corner where we now operate.

Q. You entered into an agreement with the Atlantic Refining Company dated February, 1928?

A. February, 1928, February 2nd.

Q. I show you what purports to be that agreement, marked Exhibit C3, and ask you whether or not that agreement was entered into by you or it was—look it over carefully. 10

A. This is the copy of the agreement, but in the original agreement this paragraph which was later typewritten in was not in the original.

Q. What paragraph are you referring to?

A. "In consideration of the investment required it is agreed that the above location shall be used only for the sale of Atlantic gasoline and Atlantic motor oils." The only typewriting was concerning the cinder driveway in the original agreement.

Q. Who signed that agreement? 20

A. I signed that agreement.

Q. Did Mr. Jack Kelly sign it?

A. No, Jack didn't sign it.

Q. Did you keep a copy of this agreement?

A. When I signed the agreement Mr. Cox took it away.

Q. And was there a copy at any time of what purported to be your or was your agreement returned to you at any time?

A. It was returned around the latter part of February, 1928. 30

Q. Do you have your copy of the agreement?

A. We have the original.

Q. In the copy that was returned to you around the latter part of February was this clause that you refer to, referring to the contract marked Exhibit C3 which was just read by you?

A. No, sir, it was not in there.

Q. Reading, "In consideration of the investment required it is agreed that the above location shall be used only for the sale of Atlantic gasoline and Atlantic motor oils;" was this paper on the agreement at the time (referring to acknowledgements)?

A. No, sir, it was not; no, sir.

10 Q. Who was present at the time you signed the contract with the Atlantic Refining Company?

A. That is on February 2nd?

Q. Yes.

A. My Dad, Jack and Mr. Wood.

Q. Who else?

A. And myself.

Q. Was Mr. Cox there?

A. Mr. Cox of the Atlantic Refining.

Q. Mr. Kelly, did you write to the Atlantic Refining Company about an agreement?

20 A. About when I found out that our business was going back I wrote to Mr. Stone personally and asked him if his equipment could not be bought and he wrote back and said no it could not. I immediately returned that letter and told Mr. Stone that the purchase price was in the original agreement. Immediately Mr. Stone wrote back and sent a copy of the agreement along with the letter stating specifically that the equipment was not for sale.

30 Mr. McGee: May I have that letter, Senator, if you have it?

Mr. Richards: Will you give us the time of this?

Q. When was that letter written?

A. The letter —

Q. To Mr. Stone relative to the agreement, about when?

A. It was in May, sometime during May.

Mr. Richards: What year?

A. 1928.

Mr. Richards: Now, I don't understand the witness's answer at all. What does he mean by—the question, if your Honor please, does not seem to me to be responsive. It may be, but I don't understand it. He talks in his answer about writing to find out if this equipment could be bought and that as a result this contract was sent to him. Now, at that time he already had a contract. Now, I don't understand that. Perhaps I am wrong. 10

Mr. McGee: If you will let me have the letter—I have an agreement with Mr. Endicott that they will produce all those letters. 20

Mr. Richards: Very glad to give you a letter.

Mr. Endicott: Which letter do you want?

Mr. McGee: Letter referring to the purchase of the Atlantic Refining Company equipment written to Mr. Stone.

30

(Letter produced.)

Q. Mr. Kelly, I show you letter dated July 10th, and ask you whether or not that is the letter that you wrote to Mr. Stone that reads: "Dear sir: It is in our contract Atlantic Refining Company and L.

V., and J. A. Kelly that underground equipment can be purchased by second party. We are writing for the price of such equipment and would appreciate an early reply. Thanking you, we are sincerely yours, Louis Kelly, Louis V. and J. A. Kelly."

A. I wrote that to Mr. Stone.

Q. Did you get a response to that letter?

A. Yes, sir, from Mr. Stone himself.

10 Q. I show you a letter dated July 30th, 1928, and ask you whether or not, the letter from the Atlantic Refining Company, and ask you whether or not that is the reply to the letter that just was read to you?

A. Yes.

Q. What does that letter say?

20 A. Letter says: "Your letter of July 27th returning our letter of July 12th, we are attaching hereto a copy of the agreement which you executed and the agreement carries with it the entire terms. You will notice going over this agreement that no option is granted for the purchase of the equipment and as stated in our letter of July 12th we therefore would not be in position to sell you the equipment. The writer is asking Mr. E. R. Cox, Jr., to get in touch with you in the meantime, and the writer also expects to be in Atlantic City on Friday next, August 3rd, at which time I will be very glad to discuss the matter with you. Signed Harold P. Stone."

Q. With that letter did you receive a copy of the agreement?

30 A. Yes, sir.

Q. I show you a paper which purports to be a copy of the agreement entered into on February 2nd, 1928, between yourself and Paul and Jack Kelly and ask you whether or not that is the copy you received?

A. Yes, sir, that is the copy.

Q. Is that any different from the agreement which

is offered in evidence marked Exhibit C3 in any of its terms and conditions?

A. The copy hasn't any of this acknowledgment on it and it also hasn't this typewritten.

Mr. Richards: I object. The exhibit offered in evidence was offered and accepted without the acknowledgments, so I ask that part be stricken.

The Court: Yes, I will permit it to remain. 10

Q. Anything else, Mr. Kelly, in there that is not in the one offered in evidence?

A. You mean between the original and copy?

Q. Between the one that was offered in evidence and the copy that you received?

A. There is the typewritten form here that follows immediately after installing the cinder driveway.

Q. Was that in the contract when you received it? 20

A. No, sir, it was not.

Q. Is this a correct copy of the contract as you signed it?

A. This is a correct copy as I signed it before my Dad, Jack, Mr. Wood and Mr. Cox, before he took it away.

The Court: I don't quite understand your purpose, Mr. McGee. You have testified that you have the original contract signed by this man. Now, you are attempting to prove by some other paper what that contract was. Why not produce the contract? 30

Mr. McGee: If the Court please, the testimony was that he lost it.

The Court: I haven't heard any such testimony.

Mr. Richards: That is why I haven't objected.

The Court: I am only hearing a part of what Mr. Kelly says.

Mr. Richards: If your Honor please, I would have been on the job and objected to this, but he said he had lost it. Of course, I haven't had time to test him about that.

10

Mr. McGee: Then do I understand that you testified that you lost it?

Q. Now, Mr. Kelly, did you lose the copy of the contract which you received from the Atlantic Refining Company?

A. I did, and that was the purpose of writing Mr. Stone because I understood in the agreement that we could purchase the underground equipment at any time.

20

Q. Have you been able to locate that copy?

A. No, I have not.

Q. Is this the only copy of the agreement that you have?

A. That is the only copy of the agreement.

Q. Is this a correct copy of the agreement as you executed it?

A. Yes, sir.

Q. In all its terms?

30

A. In all its terms, just merely the form.

Q. Now, Mr. Kelly did you talk to Mr. Cox about the discount?

A. Prior to going into the station we talked about discount.

Q. And did you discuss with Mr. Cox the discount at any time after that?

A. Yes, on several occasions.

Q. What was your conversation with Mr. Cox?

Mr. Richards: I object to it.

The Court: This is since the date of the contract. Whether it will reach the validity of the contract or not I can't tell.

A. We were erecting the station and he stated our 10
part of erecting the station —

The Court: Not the conversation before this contract that is in contemplation, any conversation you had after the contract was signed.

A. That is it, I am telling, Mr. Cox came in and that is what we are talking about, and he says, "All right, for your part in erecting the two buildings, which is shown, that we will give you an additional 20
half cent, and we will continue that if you reach over ten thousand per month or better." Now, that first month we received from the Atlantic Refining Company that additional discount and thereafter that first month we never did receive it, and I asked Mr. Cox and complained about it, and he brought others there, and he said well, it was just discontinued.

Q. Were you getting any other discount besides that?

A. We were getting two cents. 30

Q. Did you discuss that with Mr. Cox after the execution of this agreement?

A. Yes, sir, and up to including 1928, the full year.

Q. After you had this discussion with Mr. Cox, what did he say to you about whether or not the discount would be allowed?

A. Is that the half cent?

Q. Either one or both?

A. Well, he said the half cent was discontinued and I had—he showed me some sort of a letter, he wouldn't leave me read it, he read it to me in his own hand, that they discontinued the half cent. I asked him for what reason, well, the price changed but the two cents continued.

10 Q. Mr. Kelly, when you discussed the discount of two cents and one-half cent with Mr. Cox, after the execution of this agreement, that is, after February 2nd, 1928, what did Mr. Cox say to you as to whether or not you could get it?

A. He told us he would go to the Philadelphia office and report back on it, and he came back, and he says, "Yes, we will allow you the two and a half cents." That was sometime in the latter part of February.

20 Q. Now, how long did that one-half cent discount continue?

A. For one month.

Q. Then it was discontinued?

A. Yes, and then we complained to him and he said it was discontinued May the 10th, and they gave us discount up to and including May 10th.

Q. Were you still receiving the discount of two cents?

A. Yes, sir, up until October.

Q. And then was it discontinued?

30 A. That discount was discontinued.

Q. Did you complain to Mr. Cox at any time or have any conversation with him about the gasoline, the sale of it?

A. On several occasions, yes.

Q. About when was that?

A. It was shortly after we started the station, it was during the month of March, we repeatedly

complained to him about the color of the gas, and the condition of the gas.

Q. What do you mean, the condition?

A. Well, the foreign element, it was cloudy, it was dirty and contained water, which over half of our regular customers that we had built up a business for the past three years had complained to us and told us —

Mr. Richards: Wait. I object.

10

The Court: Yes.

Mr. Richards: I ask that be stricken.

The Court: Yes.

Q. Don't tell us what somebody else told you unless it was before Mr. Cox. Any of these conversations with Mr. Cox when the complaints were made? 20

A. Yes.

Q. What was said then and who was talking?

A. Mr. Cox was there and myself and my Dad and Jack.

Q. But I mean these complaints from your customers, were any of these complaints made before Mr. Cox?

A. No, they were not made before Mr. Cox.

Q. Had you used some of the gasoline yourself? 30

A. Yes, sir, I had used it.

Q. Did you have any trouble with it?

A. I had considerable trouble with it.

Q. What seemed to be the trouble?

Mr. Richards: Not what seemed to be the trouble.

Q. What was the trouble?

A. The trouble was water condition in the gas.

Q. And what effect did that have, if any, on the automobile or machine you were driving?

A. There you can't run a car on water, and that gas the water will naturally lie in the bottom of the tank.

Q. What would happen?

A. Well, the car would stall.

10 Q. Did that happen a few or very many times?

A. It happened all the time that I was using Atlantic gasoline.

Q. Mr. Kelly, you say there was water in the gasoline. Were you ever given credit for water being in the gasoline?

A. Yes, sir.

Q. I show you what purports to be a credit memorandum from the Atlantic Refining Company being number 24043, dated March 10th, 1928, where it
20 states that, "for the value of the following, due to same containing water, 20 gallons Atlantic gasoline, 18 cents a gallon, \$3.60," and above that, "We this day credit your account as follows"—was that received by you from the Atlantic Refining?

A. That is right, they credited our account with that.

Q. Mr. Kelly, you saw the gasoline arrive at your service station?

A. Yes, sir.

30 Q. Did you talk to any of the drivers about this cloudy condition as well as Mr. Cox?

A. Yes, sir.

Q. And what, if anything, did the drivers tell you?

Mr. Richards: I object to what the driver told him.

The Court: Sustain the objection.

Q. Did you look at the trucks?

A. We always make a habit of getting up and opening the trucks and see that they are filled up to the top.

Q. Did you notice anything at any time in the gasoline?

A. I noticed an oily black substance.

Q. Do you know what that was caused by? 10

A. I learned later that it was fuel oil.

Mr. Richards: Wait.

Q. Did you talk to Mr. Cox and tell him of this condition?

A. Yes, sir.

Q. And what you thought caused it?

A. I talked also to Mr. Stone.

Q. Mr. Stone also? 20

A. Yes, sir.

Q. And what did you tell them you thought caused it?

A. I told him I thought they were using the trucks for holding fuel oil.

Q. And what did they say to you?

A. They admitted they were.

Q. Did they say anything else?

A. They said that it is strange that the condition should be there after they had cleansed the trucks. 30

Q. Did they say anything about remedying it?

A. No.

Q. Mr. Cox testifies that he had a conversation with you about you getting in the other oil or selling it. You had a conversation with Mr. Cox, did you?

A. Yes, sir.

Q. What was your conversation?

A. I told him that our major sale was Invader oil, and he said —

Mr. Richard: Let's have the date of this.

The Court: Yes.

Q. About when was that, Mr. Kelly?

10 A. This was when we first went into the station, March the 1st, 1928.

Q. What was the conversation?

A. The conversation was that Mr. Cox says, "You are a hundred percent, you can't sell this oil," so we told him we would have to give up the station if we gave up Invader oil, because Invader oil was our activity, and he says, "All right, don't leave it around, then, when Mr. Stone comes around," and Invader oil has always been there.

20 Q. Where?

A. In the front of our station.

Q. Referring to two photographs marked C1 and C2, will you point out which particular part of the photograph this Invader oil is located?

A. Right there.

Q. In the center before the window of the office?

A. On the outside of the door.

Q. Just on the left side of the door, coming out?

A. Yes, sir.

30 Q. Has it ever been away from that particular location?

A. Not since we owned the station, always been there.

Q. Did Mr. Stone see this also?

A. Yes, sir, he saw it.

Q. What did Mr. Stone say?

A. Mr. Stone —

Mr. Richards: If you Honor please, I object to it on the ground that is an attempt to modify the contract, and could only be done by another contract, or by showing either Cox or Stone's authority to modify it. This contract is with the company, the complainant here, and not with its employes.

The Court: I think that is the effect of the testimony. I will permit it to be offered, though.

10

(Question repeated.)

A. Mr. Stone in the way that he has says, "Why don't you use our oil?"

Q. Did he tell you to remove it?

A. No, sir, he did not.

Q. Did you ever—did you at any time discontinue the sale of Invader oil?

A. Ever since we have been in business.

Q. Is Invader oil sold by the complainant, Atlantic Refining Company?

20

A. No, it is sold by Charles F. Kellom Company.

Q. Mr. Kelly, after the execution of the contract with the Atlantic Refining Company, you had a discussion with Mr. Cox, you testified, as to the discount of two cents under tank wagon, and half a cent a gallon after you sold ten thousand gollons in any one month?

A. Yes, sir.

Q. Did you tell Mr. Cox that he had to give you that discount or that you would like to have it?

30

A. I told him it was part of the agreement—we would like to—it was due us.

Q. Did you tell him what you would do if they did not give you the discount?

A. Not at that time.

Q. Did you tell him at any time subsequent?

A. Told him later, it was some time during August.

Q. What did you tell him then?

A. We told him we were going to open up the lot next door and sell competitive gas.

Q. Why?

A. Because they didn't live up to their agreement.

Q. In what respect?

10 A. The discount.

Q. Which discount?

A. The half cent discount.

Q. What did he say to that?

A. He didn't give any answer at all, just merely snickered and drove on.

Q. Was that usual with Mr. Cox to act that way?

A. As a rule, yes.

Q. Mr. Cox testified that he went to the American store which is adjacent or next to your property and secured a couple of jars and filled them with gasoline.
20

A. That is true.

Q. From your pumps?

A. That is true.

Mr. Richards: He didn't so testify.

Q. What did Mr. Cox do?

30 Mr. Richards: He testified —

The Court: Question is withdrawn. And now the question is what did Mr. Cox do.

A. Mr. Cox filled these jars with gasoline from each of the four pumps, stating that he wanted to

take them to Philadelphia to have them passed through the laboratories and report on them as to conditions of the gas.

Q. Did you ever have a conversation with Mr. Cox about those jars of gasoline again or at any time?

A. Several times asked him what was the report. He never gave us a report on them.

Q. Did you tell Mr. Cox, never mind having them analyzed?

10

A. No, I did not.

Q. Because one of your customers was satisfied and everything was going fine?

A. No, I did not.

Q. Did you install other companies' equipment on this property located at the northeast corner of Delevan and Ventnor Avenue?

A. Yes, sir.

Q. Why did you do that?

A. We was compelled to in order to keep in business.

20

Q. What made you think that, or why did you come to that conclusion?

A. From the sale of gas and from our customers' continual complaints.

Q. Was your volume on your sales dropping off?

A. Dropping off considerably.

Q. Had you been in the service station business prior to entering into a contract with the Atlantic Refining Company?

30

A. Yes, sir, for two years.

Q. Where were you located?

A. On the opposite corner, northwest corner.

Q. Did the Atlantic Refining Company issue any kind of cards to customers?

A. They issued courtesy cards.

Q. Did any of those customers stop at your service station?

A. Several times they have stopped.

Q. And what, if anything, happened?

A. I don't understand the question.

Q. When they stopped did they do anything, just talk to you or what?

A. They would fill up with gasoline and as usual with me, look at the oil and water, and afterward
10 go to collect the money, they would exhibit one of these courtesy cards.

Mr. Richards: If your Honor please, I ask the answer be stricken. I can't see how we are interested in the fact that somebody came along and didn't pay these people for their gas purchased.

Mr. McGee: If the Court please, I intend to follow it up that this complaint was made to the company, and asked whether or not they could not work
20 some proposition to handle that situation because of the loss that the service station was sustaining, which is one of the chain of just what was happening in the entire transaction.

Mr. Richards: If your Honor please, that has nothing to do with our contract.

The Court: At the present time I can't see any
30 connection at all with it. I will sustain the objection.

Q. Now, did you ever tell Mr. Cox that a salesman for one of the other companies was a nice fellow and that was the reason you were making the change to other companies' gasoline and motor oils?

A. Yes, sir.

Q. What did you tell Mr. Cox was the reason in December, 1928?

A. Mr. Cox never brought that up.

Q. Never brought that up?

A. The reason for changing.

Q. What did you tell him the reason was?

A. I told him that to see Mr. Deher, when Mr. Cox came to the station, says, "Here, here, you can't do that," so we were busy at the time, I told 10 him to see Mr. John Deher.

Q. Later on, did you have a conversation?

A. Mr. Cox has never been around the station since December 23rd until about March, 1929.

Q. Did you talk to, when you talked to Mr. Cox did he ask you why you were making the change?

A. No, sir, he did not.

Q. Did he say anything to you?

A. No, sir, he did not.

Q. You told him to go to see Mr. Deher, didn't 20 you?

Mr. Richards: Wait a minute; going to argue with your own witness?

Mr. McGee: I am not arguing, sir.

The Court: Sustain the objection; cross-examining your witness.

30

Q. What did Mr.—about how many times in 1928 did you complain to Mr. Cox and Mr. Stone about the company's products?

A. I remember complaining to Mr. Stone twice and to Mr. Cox I should judge about five times about the condition of the gasoline.

Q. Did you tell him the situation was serious?

A. I told him the situation was serious and Mr. Stone says, "We are coming out with a new gasoline."

Q. When did they come out with a new gasoline?

A. Around the middle of May, 1928.

Q. Were your sales better?

A. Sales were not immediately better, they were better when the summer folks came.

10 Q. Was there a dropping off at any time during the year?

A. There was a considerable dropping off.

Mr. Richards: I object to the question on the volume of sales, I don't think it is important so far as our contract is concerned.

The Court: I will permit it.

20 Q. You operated the service station on the opposite corner, isn't that what you testified to?

A. Yes, sir.

Q. For two years?

A. Yes, sir.

Q. How did your sales of this Atlantic gasoline compare with the sales of the gasoline that were sold on the opposite corner?

30 Mr. Richards: That is objected to.

The Court: Sustain the objection.

Q. Were you making any profit on the sale of Atlantic Refining Company's gasoline?

Mr. Richards: That is objected to.

The Court: Sustain the objection.

Q. Did the Atlantic Refining Company pay for the concrete driveway?

A. They paid part of it.

Q. What did the driveway cost?

A. Cost around \$325.

Q. \$325; how much did you pay?

A. We paid \$187.50.

Q. You paid \$50 more than the Atlantic Refining 10 Company paid?

Mr. Richards: If your Honor please, it has just occurred to me that the original question was stricken out, and I ask that this be stricken.

The Court: What original question?

Mr. Richards: The original question was on the cross-examination when Mr. Cox was asked about 20 this concrete affair for which they were not charged, and my objection to the question was overruled.

The Court: Mr. Cox testified they paid the additional sum of \$215 for concrete for which Mr. Kelly was to pay half, and then upon being questioned as to how much he actually did pay, Mr. Cox was unable to give it accurately, and his testimony was then stricken, that part of it. I think I will permit it to remain.

30

(Question repeated.)

Q. Is that correct?

A. We paid \$187.50.

Q. Now, did you have an arrangement with the At-

Atlantic Refining Company as to what they were to do in and about your premises?

A. Yes, sir.

Q. Did they complete that arrangement with you?

A. No, sir, they did not.

Q. What did they leave out, if anything?

A. They agreed to paint —

Mr. Richards: I object. That varies the terms
10 of the contract.

The Court: Yes; like to hear you on that.

Mr. McGee: If the Court please, along with this contract was, I understand a blue-print was used there, and that belongs in the contract, at least, I thought so. I see it is not included, so I withdraw that.

20 Q. Mr. Kelly, under your agreement that you had with the Atlantic Refining Company as to the discount of two cents and one-half cent, have you computed the amount that is due you considering the volume of gasoline that you have sold?

A. Yes, sir.

Q. I ask you whether or not this is the statement of the various amounts that are due you as a consequence of this agreement?

30 Mr. Richards: Just answer yes or no.

Q. What were the amounts?

Mr. Richards: Objected to, if your Honor please.

The Court: Sustain the objection.

Q. Mr. Kelly, is there any money owed to you from the Atlantic Refining Company at the present time?

A. Yes, sir.

Mr. Richards: Objected to.

The Court: Sustain the objection.

Mr. McGee: If the Court please, there is testimony here that a contract was entered into for the sale of, or for a discount in the sale of, discount of two cents and one-half cent. 10

The Court: How can that affect the case? How is that a violation of the contract which you can claim it makes the contract void?

Mr. McGee: If the Court please, we have counter-claimed for that amount of money. 20

The Court: You have counter-claimed for the amount of money?

Mr. Richards: If your Honor please, they haven't laid the foundation.

The Court: I will permit it for his counter-claim for the amount of money. 30

Mr. Richards: If your Honor please, this is our point, that they haven't laid the foundation because they haven't shown the authority of these men to speak for this company.

The Court: That is true, but the order of the

trial, I can't hold the defendant strictly to that; if it is not connected later, of course it may be stricken.

Mr. Richards: If the idea is that it must be connected?

The Court: I will permit both the question previously overruled and this question on the ground it is in the counter-claim.

10

Q. How much money is due you?

A. About five hundred dollars.

Mr. Richards: I ask that answer be stricken.

The Court: Yes, let it be stricken.

Q. Do you know exactly, Mr. Kelly, what is due you?

20

Mr. Richards: He said he did, counsellor.

The Court: He said he knew.

A. The exact amount?

Q. The exact amount.

Mr. McGee: If the Court please, I understand the objection was sustained on the ground he said about.

30

The Court: That is it exactly.

Q. Do you know exactly?

A. The exact amount is —

Mr. Richards: Will you answer, if you know?

The Court: He is asked for the amount.

Mr. Richards: I object to the witness reading from a memorandum unless we find out how he comes by the memorandum.

The Court: That is true.

Q. Mr. Kelly, were you in my office yesterday afternoon? 10

A. Yes, sir.

Q. And were any of these figures figured out at that time?

A. All of them, yes, sir.

Q. I ask whether or not you witnessed those figures being made on the paper?

A. Yes, sir.

Q. Are they the same figures that are on that statement?

A. Yes, sir, same figures. 20

Q. And those figures were correct as set forth on this yellow sheet which was used for the purpose of computation?

A. Yes, sir.

Q. Where were those figures taken from?

A. From the Atlantic Refining Company slips.

Q. And what is the amount?

Mr. Richards: I still object.

30

The Court: Sustain the objection.

Q. Mr. Kelly, did you figure out the amount that was due you from the Atlantic Refining Company discount or have any other figures?

A. Yes, sir.

Q. How much was that?

Mr. Richards: I object.

The Court: Sustain the objection.

Q. Does the Atlantic Refining Company owe you any money?

A. Yes, sir.

Q. Do you have a statement of that?

A. Yes, sir.

10 Q. Do you have that statement with you?

A. I have a copy.

Q. Is this the statement you refer to, referring to the gallons?

A. Yes, sir, that is it, the gallons.

Q. From that can you determine the amount that is due you from the Atlantic Refining Company?

A. Yes, sir.

20 Mr. McGee: If the Court please, if the Senator wants to, we will figure this out.

Mr. Richards: Yes, I want to find out where you get the data from. If your Honor please, not getting into an argument with counsel, all that we can find out today is that his client and he got together in his office yesterday afternoon and figured out how much was due him.

The Court: Sustain the objection.

30

Q. Now, Mr. Kelly, where did you take these figures from?

A. These figures were taken from slips of the Atlantic Refining Company.

Q. Added up by you?

A. Added up my me.

Q. Were they placed on that paper?

A. Yes, sir, I placed them on that paper.

Q. Do those figures make up the entire gallonage that was purchased from the Atlantic Refining Company?

A. Yes, sir.

Q. From that you can determine the amount due you from the Atlantic Refining Company?

A. Yes, sir.

Q. Then, will you figure out the amount that is 10 due you?

A. Yes, sir.

Mr. Richards: If your Honor please, this is all useless. There is only one way he can possibly do it, either from the books of the account or from the slips.

The Court: That is the point I have been ruling upon at all times. 20

Mr. McGee: If the Court please, Mr. Kelly testifies he has taken these from the slips.

The Court: The other side are entitled to see the slips.

Q. Where are the slips?

A. Down in our service station.

(Recess taken until 1:30 o'clock P. M.)

AFTERNOON SESSION.

(Trial of the cause resumed at 1:30 P. M.)

(Letter and copy of the contract from Atlantic Refining Company offered in evidence.)

Mr. Richards: I don't object to the letter, but
10 I do object to the contract, if it is intended to contradict or vary the terms of the contract offered in evidence, that it is inadmissible. The proof of that should be by way of the original copy of the contract which was in his possession and lost if it has not been accounted for.

The Court: I will admit the paper as being a paper mailed by a representative of the complainant company to the defendant.
20

(Letter and copy of contract received in evidence and marked Exhibits D1 and D2.)

LOUIS KELLY, recalled.

Direct examination (resumed).

30 By Mr. McGee:

Q. Mr. Kelly, did you receive a letter from the attorneys for the Atlantic Refining Company at any time informing you that you were using other gasoline company equipment and products?

A. At what time of the year, Mr. McGee?

Q. I show you a letter from Endicott and Endi-

cott, Esquires, dated the 26th day of December, 1928, addressed to Louis Kelly, wherein it states that: "We have been employed by the Atlantic Refining Company to institute an injunction proceeding against you for the purpose of restraining you from selling any oil other than the products of the Atlantic Refining Company at the above address. We are informed that you have erected a pump upon the adjoining lot and serve your customers from the corner property which has been improved with the apparatus of the Atlantic Refining Company. Reference to your contract will call to your mind that the following provision was incorporated therein: 'In consideration of the investment required it is agreed that the above location shall be used only for the sale of Atlantic gasoline and Atlantic motor oils.' We are writing this letter to you to advise you of our intention so that you may remove the objectionable pump and discontinue the sale of competing gas and oils. If you desire to remove the pump you are notified to do so not later than the 27th. Very truly yours, Endicott & Endicott, by Allen B. Endicott, Jr."

Mr. Richards: Your Honor please, I have let some of this testimony go in, didn't care very much, I suppose we had to meet it at some stage of the proceedings, and we might as well meet it now. I can't see any relevancy in this line of examination because the answer admits the making of the contract. Now, do I understand that it is a defense that is raised here that they were not obliged to use the Atlantic Refining Company's products exclusively; is that the defense?

Mr. McGee: Our defense is that the terms of this written contract were varied, and therefore the con-

tract is null and void and that we were permitted to use any company's products we saw fit.

Mr. Richards: I have never heard of any such doctrine as that, if your Honor please, that the alteration of the contract voided the contract.

Mr. McGee: Material alteration is our contention.

10

The Court: There has been considerable discussion concerning this case, whether it was in or not. What difference does it make? The second clause afterwards gives almost in the same language.

20

Mr. McGee: If the Court please, I understand the cases on that point, material alteration, the cases seem to hold that the legal import if any instrument is changed: "A material alteration of a written instrument made after its execution by a party claiming thereunder or with his privity, without the authority or consent of the other party or parties to the instrument, invalidates the instrument in the hands of the party responsible for the alteration." Now, I understand that is the law.

The Court: It may be, but where is the application in this case?

30

Mr. McGee: The purpose of the company, the complainant, in basing this case on this clause which was incorporated or inserted in the contract, which I understand would make it immaterial. Now in their letter they have stated that that is the reason for their default, or for them stepping outside of this contract and breaching it, and this is a proceed-

ing on a negative covenant and there isn't any, as far as I know, covenant or term in that contract which is specifically set forth in the same wording as this.

The Court: It may not be exactly the same wording, but it is almost the same.

Mr. McGee: But, if the Court please, that is entirely what they are depending on. 10

Mr. Richards: No.

Mr. McGee: The letter here so states.

The Court: That may be true, but that don't bind them. But to what question is the present objection made?

Mr. Richards: The objection is, he started in to read this letter and founded a question upon it which evidently is intended, I think whether he received the letter or something of the kind, but the whole object of the letter was apparently to try and bind us to the idea that we were resting either on this clause or this clause was material to this issue. Now, in the first place, of course, counsel was not bound by a letter written to the opposing side to pursue only one course when we had some other. He had no right to do that, no authority to do that, to begin with, but, secondly, we have the immediate proposition here that the clause which the defense says was not in the original is not material because twice in this contract is it definitely repeated, almost the same language, to the same legal effect, and far more strongly, the first time from a legal stand- 20 30

point, and this phrase, that the defendant is compelled to use exclusively the products of the complainants. Now under those circumstances I can't see what relevancy this whole line of defense has, so I am really now putting myself on record as objecting to the line of defense.

The Court: You may do that. I will permit the question. The objection goes to the entire line of
10 the defense.

Mr. Richards: Your Honor, of course, is familiar with the fact that the bill sets out the whole contract and that the answer admits the making of the contract.

The Court: Admits the making of the contract, but alleges in the counter-claim, as I recall it, that that clause was not in, the eleventh clause of the
20 counter-claim says the copy of the contract attached to the complainant's bill has been changed.

Mr. Richards: If your Honor please, may I understand upon what basis this letter is admitted? Is it tending to vary the terms of the contract?

The Court: I can't rule upon that. Here is a letter written by counsel to the defendant. I don't know what extent it will have. It may not be with-
30 in the scope of the authority at all. I can't tell.

Q. Mr. Kelly, was this letter received by you?

A. Yes, sir.

Mr. McGee: Offer it in evidence.

(Objected to.)

(The letter is admitted in evidence and marked Exhibit D3.)

Q. Mr. Kelly, referring to that letter marked D3, did you erect on the adjacent premises Atlantic Refining Company pump?

A. No, sir.

Mr. McGee: I want to offer this pertaining to the water in evidence also. 10

(Credit memorandum admitted in evidence and marked Exhibit D4.)

Cross-examination.

By Mr. Richards:

Q. Mr. Kelly, let's find out just exactly what you are contending in this case. Do I understand it that you are contending that you did not agree to use the Atlantic Refining Company products exclusively? 20

A. No, sir.

Q. What do you mean, that you did not so agree?

A. We signed the agreement, that is true, at least, I signed the agreement, but we never —

Mr. McGee: I object, if the Court please. The contract speaks for itself. 30

The Court: Yes, but you have questioned the contract. I will permit the examination of the witness.

A. Can't say we used Atlantic exclusively from

the very beginning, because we always had Invader oil.

Q. That is not my question. My question is whether or not your agreement, that you understood your agreement to be to use exclusively Atlantic Refining Company products?

A. No, sir, not from the beginning.

Q. You didn't so understand your contract?

A. No, sir.

10 Q. You never had the notion that you could not sell other gasoline or other oil?

A. Not other gasoline, but we had the idea we could sell other oil.

Q. Well, you thought, then, that you had the right to sell other oil?

A. Yes, sir.

Q. But not other gasoline?

A. Not other gasoline.

Q. That was your understanding of the contract?

20 A. Yes, sir.

Q. That was the thing that you signed?

A. Yes, sir.

Q. Now, then, what particular difference did it make to you whether or not this clause was written in typewriting on the second page of this contract?

A. Well, it wasn't in the original.

Q. That is the only reason?

A. Yes, sir.

30 Q. Not that it made any difference in your understanding of what the contract was?

A. It meant that it binds us, we couldn't sell even the oil, according to that.

Q. That is your complaint?

A. Yes, sir.

Q. Now, the complaint of Atlantic Refining Company, however, was from the installation of this gasoline pump, wasn't it?

A. Yes, sir.

Q. Why was it you put this gasoline pump on the adjacent land instead of on your own land?

A. We did put it on our own land.

Q. You did put it on your own land?

A. Yes, sir.

Q. And not on the adjacent property?

A. No, sir.

Q. But, of course, you are not contending but what you are violating the terms of this contract, at least, 10 so far as it relates to the selling of gasoline, are you?

A. I don't understand the question, Senator.

(Question repeated.)

A. Yes.

Q. What do you mean by "Yes"?

A. According to the way I understand the question —

20

Q. I am asking you whether or not you are contending that you are violating this contract, you mean by that to say that you admit that you are violating the terms of the contract?

A. Yes, sir.

Q. So far as it relates to the sale of gasoline?

A. Gasoline, yes, sir.

Q. Now, you read the contract at the time you signed it, didn't you?

A. I read it over hurriedly.

30

Q. Hurriedly?

A. Yes, sir.

Q. But you read it?

A. Yes, sir.

Q. Now, do you want to say that this typewriting part was not printed on the second page at the time you read it?

A. No, it was not. Was not of that printed form in it at all.

Q. None of the printed form?

A. No, sir.

Q. What do you mean by none of the printed form?

A. For instance, this here, all this was a blank form.

10 Q. It was a blank form when you signed it?

A. Blank form.

Q. Nothing in it at all?

A. Not even the names printed.

Q. How did you come to sign a blank form?

A. Well, Mr. Cox, in order to put the contract through said, "Sign this paper, and in a day or so it will be back."

Q. Didn't it come back?

A. It came back about three weeks later.

20 Q. Did you read the paper that came back?

A. No, sir.

Q. You didn't.

A. We looked it over, but didn't read it.

Q. It didn't contain all of the printed matter that is in here?

A. No, sir, it did not.

Q. What didn't it contain—contained all excepting this one clause?

A. All excepting that one clause.

Q. You were satisfied with that, weren't you?

30 A. Yes, sir.

Q. You never made any complaint about it?

A. No.

Q. Now what became of that contract after you got it back?

A. Well, I was showing it to different parties, one party claimed that they returned it and they didn't return it.

- Q. Who was that party?
A. That was a friend of mine.
- Q. Who was it?
A. Mr. Mulholland.
- Q. Well, he is here in court, isn't he, today?
A. Yes, sir.
- Q. Has he got it with him?
A. I don't know.
- Q. Did you ask him to produce it here?
A. No, sir. 10
- Q. You didn't?
A. No, sir.
- Q. You made no effort to get it back?
A. Yes, at the time before I did, and that was some months ago, but not recently.
- Q. And you didn't get it back?
A. No, sir, not to my knowledge unless it was brought back and put in the station and got lost.
- Q. Now, that has been since this trouble started, wasn't it? 20
- A. Before.
- Q. He borrowed it, you mean?
A. Yes, sir.
- Q. When did he borrow it, about, do you know?
A. Around November.
- Q. And the trouble started a month later, in December?
A. December.
- Q. And if he returned it, he returned it probably after the trouble started? 30
- A. Before.
- Q. Before the trouble started?
A. Yes, sir because when we came to look for it when the trouble started, we hadn't it.
- Q. Then you lost it between, either in your place between November and December, or Mr. Mulholland still has it?

A. It was lost before that, so far as I can remember we went after it in November, we were looking for it long before that.

Q. Why were you looking for it?

A. We were looking for it to show to another competitive oil company.

Q. What was there about the one you lost that was different from the copy you produced here?

A. There is no difference only that clause.

10 Q. But you had this one, you had the copy by that time?

A. Yes, we had the copy.

Q. Then why didn't you show the copy that you did have to the competitive company?

A. I did.

Q. Why did you look for this one, then?

A. Because I wanted to see if that clause was in there.

20 Q. Well, what suggested the idea to you that there was such a clause?

A. Because Mr. Mulholland and I compared the agreements, his and ours.

Q. Now, that doesn't quite answer my question. You claim that you never saw or heard tell of that typewritten part in that language until this suit was started, didn't you?

A. This clause.

30 Q. Of course, you never had any copy of it, therefore you couldn't have known anything about it, then why did you want to see whether that clause was in there or not?

A. Because in November Mr. Mulholland came down and he showed me his lease, and I told him that that wasn't like ours.

Q. How did you tell him it differed?

A. I told him that that "In consideration" wasn't in our lease.

Q. What difference did that make?

A. And he said it must have been.

Q. What difference did that make?

Mr. McGee: I object.

The Court: Sustain the objection. It isn't for him to say what difference it makes. I am afraid the Court has got to determine the difference.

Q. Why did you say that that clause apparently varied your contract when you had the printed clause in here which was very similar to it?

10

A. It may be similar, but it doesn't mean the same thing.

Q. Now, doesn't it say: "That the party of the first part, in consideration of the party of the second part, purchasing all gasoline, motor fuels, motor oils and greases, handled and dispensed from said piece of land as above described, solely from the party of the first part, as the party of the second part following the specified prices prevailing in the town, city, in which said land is located," and so forth. Now, that was in there, wasn't it?

20

A. Yes, sir.

Q. That was in the copy that you got originally?

A. Yes.

Q. It was in the copy that they sent down to you afterwards, wasn't it?

A. Yes, sir.

Q. No question about that?

30

A. No.

Q. Now, with that clause being in there, why did you want to find out whether or not this typewritten clause was similar to one that Mr. Mulholland had, when you never heard tell of this being in your contract until the suit was started?

A. We were comparing leases, that is the only difference.

Q. That is the only answer you can make to that?

A. Yes, sir.

Q. What I am trying to get at, Mr. Kelly, is, my question isn't long and complicated, is this, that I want to know how you got the notion in your head that there was some sort of a typewritten clause working some place in the background in this lease
10 that you didn't know about?

A. In the copy, you mean?

Q. That is what I want to find out. It wasn't in either of the copies that you got, according to your statement?

A. No, sir.

Q. Now, that being true, and it also being true that you never heard of this typewritten clause until the suit started —

A. I said before the suit started.

20 Q. Until you got Mr. Endicott's letter?

A. Yes.

Q. That is the first you ever heard of it, wasn't it?

A. I said before that, in November.

Q. In November you heard of this?

A. Yes.

Q. How did you hear of it in November?

A. Through Mr. Mulholland's lease.

Q. How did he know it was there?

A. He came down to our station and brought to
30 us his lease.

Q. His lease?

A. His lease.

Q. We are talking about your lease, Mr. Kelly.

A. I am saying we compared —

Q. Call the lease the agreement.

A. Agreement.

Q. We are talking about your agreement, you

have told us several times that the first that you knew of this clause was when you got Mr. Endicott's letter?

A. That it was in our agreement; yes, sir.

Q. That is what I am getting at. What I want to know is why it was in November you compared with Mr. Mulholland the question of whether or not a similar clause was in your contract, where did that come from? Where did that arise?

A. Why, he came down and he showed me his 10 agreement, and I immediately saw that, and I said, "Well, that wasn't in mine."

Q. And that is the point about it?

A. Yes, sir.

Q. That is the whole point about it?

A. And that is ——

Q. You didn't say to Mr. Mulholland because it wasn't in there you wasn't obliged to buy the gasoline?

A. No.

20

Q. Now, you say that you always had reserved the right to use the Invader oil; is that correct?

A. Yes, sir.

Q. You are quite sure of that?

A. Positive.

Q. A little while ago in my examination you distinguished between your obligation to purchase the gasoline and your agreement to purchase other products, didn't you?

A. Motor oil.

30

Q. What products did the Atlantic Refining Company make that you sold?

A. Why, their gasoline, their Ethyl gas and motor oil.

Q. Motor oil?

A. Yes, sir.

Q. That was its product?

A. Yes, sir.

Q. By motor oil, you mean lubricating oil?

A. Lubricating oil.

Q. That is, this Invader oil was lubricating oil?

A. Yes, sir.

Q. Similar to the Atlantic?

A. Motor.

Q. And the Atlantic Refining Company motor oil?

10 A. Yes.

Q. That is, I mean, it was all for lubricating gasoline motors?

A. Yes, sir.

Q. The only question being possibly one of quality or some other similar matter?

A. Yes, sir.

20 Q. Now, then, it was, as I understand your contention here, now, and always has been your contention, that you were not obliged to sell only motor oil manufactured by the Atlantic Refining Company; is that correct?

A. I didn't say. I said we were under the impression we could sell other than the Atlantic.

Q. You were under the impression that you could sell other?

A. Yes, sir.

Q. That is putting it the other way, and that you were not obliged to sell their product exclusively?

A. Yes, sir.

30 Q. That was your impression?

A. Yes, sir.

Q. When did you first have that impression?

A. From the very beginning.

Q. Before you signed the contract?

A. Before and after we signed the contract.

Q. And after you signed the contract, both?

A. Yes, sir.

Q. Now, then, I show you a letter dated February 17, 1928; that is in your handwriting, isn't it?

A. That is my writing.

Q. It is signed "Kelly Brothers, L. K."

A. That is me.

Q. In this letter you wrote the Atlantic Refining Company, attention Mr. H. Stone, the following: "Hence we are writing this letter for our common good, as we are binding ourselves to Atlantic products, and we want cooperation from the company." 10

A. That is true.

Q. All right. Now, then, was it your impression that you had a right to sell other oils after me refreshing your memory about the writing of this letter?

A. Yes, sir.

Q. Still is?

A. Still is. We always had the impression we could sell Invader motor oil.

Q. What do you mean, then, by "We are binding ourselves to Atlantic products?" 20

A. Well, gasoline.

Q. Products?

A. That is their product.

Q. Well, you just told me a minute ago, that the lubricating oil was also their product.

A. So is kerosene, we are selling kerosene.

Q. That is the only explanation you can make of having on the 15th of February, 1928, written this letter to the company in which you say that you are binding yourselves to sell their products? 30

A. Yes, sir.

(Letter offered, received in evidence and marked Exhibit C4.)

Q. Now, Mr. Kelly, at the time that you got this

letter on the 17th you had received back your copy, hadn't you?

A. 17th of February?

Q. Yes.

A. No, sir.

Q. You are sure you didn't?

A. Positive. It was the latter part of February we got the copy. It was signed on February the 2d.

10 Q. How do you happen to remember that it was signed on the 2d of February?

A. Why, from the agreement dated February 2d.

Q. And therefore you must have had in front of you at the time you wrote this letter your contract, didn't you?

A. The terms?

Q. Yes, because a few minutes ago you said to me when you signed the contract it was all in blank, didn't you?

A. Yes, sir.

20 Q. So that when you got it back there must have been added the date?

A. That is true.

Q. So, then doesn't it follow that you had that contract before you on the 17th of February when you wrote this letter?

30 A. No, it doesn't, because I remember distinctly signing it and the agreement was with Mr. Cox and myself that the station would be in full operation on the 20th, and yet up to my writing that letter nothing had been done only the equipment was placed on the ground, and there was no work up to and including that date, and we were supposed to be in operation on the 20th, that is the reason I wrote that letter.

Q. Now, in your letter it says, "We are informed by Mr. Cox before signing the agreement that everything would be in readiness by February the 21st."

A. 20th or 21st.

Q. You didn't say that a minute ago. You said the 20th, in your letter you said the 21st.

A. Well, it ran in my mind it was the 20th, and that is the reason I wrote that letter to the Atlantic Refining Company.

Q. You had knowldege when you wrote this letter of all the things that were to be done in the contract, didn't you?

A. Surely. We went over that beforehand, Mr. 10
Cox and I.

Q. Now, July 10th, 1928, you wrote a letter to Mr. Stone in which you said: "It is in our contract, Atlantic Refining Company and L. V. and Jack Kelly, that underground equipment can be purchased by second party. We are writing to know the price of said equipment, and would appreciate an early reply." At that time you had the contract before you, didn't you?

A. No, sir, I did not.

20

Q. You did not?

A. No, sir.

Q. Where was it?

A. It was somewhere in the place, but when I wrote that letter I hadn't the contract before me.

Q. Why didn't you look at—had you looked at your contract?

A. Several times before that, yes, sir.

Q. Well, did you look at it before you wrote this letter?

30

A. No, sir.

Q. Now, of course, there isn't any such thing in the contract, is there?

A. I found out later, no.

Q. Did you have to have Mr. Stone remind you of that?

A. What I had reference to was the purchase price.

Q. Why did you want to purchase it, Mr. Kelly?

A. Well, to put in another gasoline, because we were not making out with the Atlantic gasoline.

Q. So that in July you contemplated abandoning this contract and using some other kind of gasoline?

A. No, not necessarily.

10 Q. Well, isn't that what you just said a minute ago?

A. Not to abandon the contract, we were to have continued on with their gasoline.

Q. If you didn't use their gasoline exclusively, you were abandoning the contract, weren't you?

A. According to their—yes.

Q. Now, so that it was in your mind, at least, to use another gasoline as early as the 10th of July?

A. Before that.

20 Q. And even before that?

A. Yes, sir, when they discontinued the half cent.

Q. You were under the impression that the contract permitted you to purchase this equipment?

A. Yes, sir.

Q. And it wasn't until they sent you another copy of the contract that you were undeceived as to that?

A. Until I was informed by that letter by Mr. Stone.

30 Q. You were informed on the 12th of July, Stone wrote to you and said: "In reply to your letter of the 10th, I refer to your agreement of the 2d of February, I don't see where there is any option to purchase underground equipment. The agreement continues until February 2d, 1933, and we consider, of course, it is in full force and effect." You wrote on the letter: "Well, there is an option on the agree-

ment and agreement is not in force until accepted as above. What is your price on this equipment?"

A. That is the way I interpreted the agreement at the time, though. They even had a price on the bottom of the agreement.

Q. After you got this letter of the 12th from Mr. Stone, did you look at your agreement?

A. No, sir, I was looking for it then and couldn't find it.

Q. Couldn't find it in July?

10

A. In July.

Q. And yet you boldly asserted that there was an option in the agreement to purchase this material?

A. As I thought, yes, sir.

Q. You didn't say as you thought, you said it was a fact that there was such an option.

A. As I thought at that time. I was certain at that time that there was.

Q. Now, what I would like to know is this, Mr. Kelly, if you were wrong about the fact that there was an option to purchase in the agreement, how can you be so certain there wasn't this typewritten clause on the second page of the agreement that you originally received?

20

A. I am positive.

Q. Why are you more positive of one than the other?

A. Well, on the bottom of the agreement they had a price of something like twenty-eight hundred, which I interpreted was the price of the equipment, and the equipment could be bought, and I am just as near sure of that as I am of that phrasing.

30

Q. Where is it on the contract the price of the equipment?

A. (Indicating.) You see I interpreted this as the price.

Q. That isn't at the bottom of the agreement, is it?

A. It is near the bottom.

Q. The part indicated by the witness is on page 2 of the agreement, referring to the agreement that in the event of bankruptcy or otherwise that they may charge the party of the second part with the sum of \$1,920 which is agreed as the fair and reasonable cost of the installation and removal of the station, whereupon such sum charged shall immediately become due and payable, or the party of the second part is to allow such system to remain and charge party of the first part \$2,820, the agreed value of the system." That is what you had in mind, was it?

A. Yes, sir.

Q. When you thought that that was an option to purchase?

A. Yes, sir.

20 Q. Now, Mr. Kelly, you said at the beginning of your examination that Jack Kelly was not in partnership with you. Was he ever in partnership with you?

A. No, sir.

Q. Why did you sign this contract, "Louis and Jack Kelly"?

A. Because at the time we contemplated going in partnership.

Q. Does he work for you?

30 A. He did at the time, yes, sir.

Q. Does he now?

A. No, sir.

Q. When did he cease to work for you?

A. Last July.

Q. Do you remember whether or not you signed your name to more than one contract?

A. Yes, sir, I think there were two.

Q. Two?

A. Yes, sir.

Q. What was the other contract?

A. The other was with that.

Q. The duplicate of it?

A. The duplicate of it, that was to go back to the company.

Q. The one that went back to the company you signed, and when the copy came back you signed that, is that it, is that what you mean?

10

A. No, I signed both of those copies.

Q. You signed both of them at the time?

A. Mr. Cox had taken both away with him.

Q. But you are quite positive that there was nothing filled in on the agreements at the time you signed them?

A. No, sir.

Q. No typewriting?

A. No, sir.

Q. Now, did you ever have both of these papers back in your hands at once?

20

A. No, sir.

Q. Or at any time?

A. Just the one.

Q. Just the one?

A. Yes, sir.

Q. That was the one that you lost?

A. Yes, the original that I lost.

Q. That original you never did see, you never saw the paper, for instance, I am holding in my hand after you signed it, the one that has this acknowledgment pasted on it?

30

A. No.

Q. You never saw that?

A. After I signed that, of course, Mr. Cox said, "Sign there."

Q. There was a cross mark there, and he said,

“Sign there,” and you signed there, “Louis and Jack Kelly, Louis Kelly”?

A. On both copies.

Q. On both copies. And that is all you did do?

A. That is all.

Q. At least, that is all you remember doing?

A. Yes, sir.

Q. Now, let me call your attention at the very beginning of this agreement; at the start, it says,
10 “This agreement, made the 2d day of February, 1928, between the Atlantic Refining Company, a corporation of the Commonwealth of Pennsylvania, party of the first part, and”—the word originally in typewriting was “Paul,” which has been struck out and the word “Louis” put in.

A. Yes, sir.

Q. Louis and Jack Kelly. Now, when was the word “Louis” written in there?

A. That was written in there when it was delivered at the latter part of February.
20

Q. You have just said that you never saw this copy before, Mr. Kelly?

A. I said I signed two of them. On mine. I don’t say that I saw that on the one, the exact copy of that, he brought it back and I told Mr. Cox the name wasn’t Paul.

Q. But it was Louis?

A. Louis, so he drew through mine and wrote the word “Louis” above.

30 Q. In the one that you have?

A. In the one that I have.

Q. And then somebody drew a line through this and wrote the word “Louis” in this one?

A. Apparently Mr. Cox.

Q. Mr. Cox must have done that?

A. Looks like his writing.

Q. Let's get this straight now. At that time that that occurred, you only had the one copy?

A. One copy, that was the latter part of February.

Q. That is the one you lost?

A. Yes, sir.

Q. That was the latter part of February?

A. Yes, sir.

Q. Sure about this?

A. Absolutely.

Q. Now, I call your attention to the fact that you 10 initialed it out here, now what have you got to say about that?

A. I don't remember that.

Q. So it must have been that you had this paper in your hands at the time that it was filled out, it now so appears, doesn't it? It is in the very ink itself. Look at it. It is the very same ink, isn't it?

A. Yes.

Q. The "L. K." very evidently in your handwriting, the same way you make the "L," same way you 20 make the "K," isn't it?

A. There is another signature there, too.

Q. Yes, that is evidently Stone's signature, isn't it?

A. I don't recall putting the "L. K." out there.

Q. The initials following it is H. B. S., which is evidently Howard B. Stone?

A. Yes.

Q. And your initials right above it are "L. K."?

A. I don't remember putting them there.

Q. And there was—and above it is the "E. R. 30 C.," evidently referring to the alteration, isn't it?

A. Yes.

Mr. Endicott: E. R. Cox, Jr.

A. E. R. Cox.

Q. So that you initialed this paper at the time that this word "Paul" was changed to "Louis"?

A. I don't remember it. All I remember —

Q. And you evidently initialed it, didn't you?

A. I beg pardon?

Q. You evidently initialed it, didn't you?

A. No, I can't say that I did.

Q. Well, do you deny that is your writing?

10 A. Well, I can't be so positive that it is. No, I can't say that I did.

Q. Now, what do you want the Court to understand, Mr. Kelly? Do you want the Court to understand now that you still adhere to your statement that the paper was a blank when you signed it?

A. I do, yes, sir.

Q. You want the Court to understand that the "L. K." was not put upon there at the same time that you signed the contract?

20 A. Absolutely.

Q. That is what you want understood?

A. Yes, sir. And we signed a little slip of paper when that was delivered for the one to us, and I didn't make any alterations or initial it.

Q. You never altered or initialed—that is your statement now—you never altered or initialed this contract?

A. No, sir, not to my knowledge. It doesn't look like my "L. K."

30 Q. What is there about these initials that makes you think that they are not your initials?

A. Because I don't recall ever putting them there.

Q. That is the only reason?

A. Yes, sir.

Q. It isn't because they don't look like your initials, is it?

A. They look similar, yes.

Q. Exactly like them, don't they?

A. No, I won't say exactly.

Q. Here is another "L. K." of yours, one on this letter.

A. Yes, sir.

Q. Exactly like it, isn't it?

A. No, it isn't.

Q. What is the difference?

A. The "L" is entirely different.

Q. How is it different, starts with the same loop 10
at the top, has the same loop at the bottom, the only
difference is here the tail is straightened out and
here it is cut off, isn't it?

A. Yes, sir.

Q. The "K" is made exactly the same way,
isn't it?

A. Yes, sir.

Q. With the exception the angle the lower end of
the "K," could superimpose one on top of the other,
couldn't you? 20

A. No.

Q. You couldn't?

A. No. It is a different "K."

Q. Here is your signature on another, L and K
this time?

A. The K is entirely different.

Q. Isn't it formed exactly the same way?

A. Similar, yes, sir.

Q. That one down stroke and two vertical strokes,
making the three-cornered K, isn't it? 30

A. Yes, sir.

Q. Let's look at the L in this case. L is formed
in the same way, isn't it?

A. Somewhat, yes, sir.

Q. Where you have written the whole "Louis" it
is exactly like it, isn't it, there?

A. Not exactly like this "L."

Q. Except the tail is a little bit longer, isn't it?

A. Yes, sir.

Q. That is the only difference?

A. Yes, sir.

Q. Witness was shown one of the sales slips which he has signed. Now, Mr. Kelly, you say that you complained about the character of the gasoline furnished you?

A. Yes, sir.

10 Q. You never had any trouble about the other products, did you?

A. Oil.

Q. You had trouble about that?

A. Yes, sir.

Q. You omitted saying anything about that before. What was the trouble about that?

A. Told Mr. Cox we had trouble with a party with the oil, he says, "I will go around and see them." I told him the oil was in the crank case didn't stand
20 up.

Q. You told him about one complaint about the oil?

A. One complaint about the oil.

Q. When was that?

A. That was some time in April.

Q. Did you ever write any letters to Mr. Cox and Mr. Stone about the quality of the oil and the quality of the gas?

A. No, sir.

30 Q. Did you ever write any letters of complaint to them at all?

A. Not of complaint, no, only in regard to the gasoline.

Q. You never complained about anything else except the gasoline?

A. To Mr. Cox, verbally, the oil.

Q. But I mean you never wrote a complaint di-

rectly to the company about the quality of the oil or the quality of the gas?

A. I just don't remember.

Q. Well, did you ever complain to them about anything else?

A. Yes, that they didn't fulfill their contract.

Q. In what respect?

A. That in the beginning they were supposed to have it finished on a certain date, and they never completed the original plan.

10

Q. All right. What else?

A. They were to make certain improvements, which they didn't do.

Q. That is what you wrote to them about?

A. I didn't write to them, no, I complained to them verbally.

Q. That is what I am asking you about, what you wrote to them about, if you did write.

A. The letters I remember writing was in regard to purchasing the equipment and in February about us binding ourselves to their products, and that they were not fulfilling their part in co-operating with us and hurrying the station through so we could get started.

20

Q. What I am getting at is this, after that letter, did you ever write and put in a kick of any kind to them?

A. I don't remember writing, but I do remember calling up.

Q. Did you ever write to them and threaten to cancel the contract?

30

A. No.

Q. You didn't do that?

A. No, sir.

Q. Now, if you did write such a letter to them, you never put your reasons in the letter, did you, or you would have?

A. I would have, yes, sir.

Q. But you would have put all your reasons in, wouldn't you?

A. Yes, sir.

Q. Now, these complaints about the gasoline and oil, did they occur before or after the first of July, 1928?

A. Before.

10 Q. Now, then, I show you a letter written on May 26th, 1928, to Mr. Stone: "The enclosed letter was given to me this noon and it is high time you and those concerned understood that this work was promised along with several other items. If you or your representative are not responsible for those promises, which are, however, verbal, then we say in all sincerity that we do not care to stay with such people. The concrete work has not been paid. The painting has not been finished. Lately we hear that
20 we were not to get two and one-half"—and you have written in brackets, and then "two and one-half cents per gallon refund according to Mr. Cox. If this be true you can arrange to move your equipment at once, for it surely will be moved after June 1st, 1928. Agreements made or promises are to be fulfilled by each party concerned. Perhaps you are ignorant of these things, but we want an understanding and we want it at once. We are certainly bothered with Mr. Colbride and Mr. Patterson who demand payment for work here, and which was to
30 be paid by your company. You yourself fixed the concrete question. And if you believe us to be dupes, Mr. Stone, you will have the opportunity to see what caliber of metal we are made of. Hoping you will take this matter up immediately, and that it may not be necessary to go further, we remain, Kelly Service, Louis Kelly." Why, at that

time, didn't you complain about the quality of the gasoline?

A. We did, but not through that letter.

Q. Or about the oil?

A. Previous to that we did, but not through that letter.

Q. So when you were reducing your kick about the promises which were not in the contract, but which had been made, you didn't say anything about the quality of the product at all, did you? 10

A. Previous to that letter we have.

Q. Not in the letter?

A. No, sir. Mr. Stone was down on the grounds and we complained to him.

Q. Why didn't you put it in the letter, Mr. Kelly?

A. Because Mr. Stone was down there about a couple of weeks previous to writing that letter, and the object of that letter was written because Mr. Colbride and Mr. Patterson wanted their money for work they had done. 20

Q. You threatened in that letter, of course, to cancel the contract, didn't you?

A. Surely.

Q. And you didn't put in as a reason, an additional reason for cancelling it, anything about any inferiority in the products, did you?

A. Not at that time, no, sir.

Q. Now, you complained about the gasoline being served in tank wagons that had contained fuel oil. What particular harm was there in that? 30

A. There was harm in that those purchasing gasoline from our station saw the dirt in the gasoline and would not return.

Q. It wasn't dirt, was it? It was oil, wasn't it?

A. It was oil, but gave it a dirty appearance.

Q. What difference did that make to the gasoline?

A. It didn't make any difference as far as the

gasoline was concerned, but psychology worked on the people and they never returned, which meant more to us than the gas.

Q. Now, Mr. Kelly, just a minute. What kind of pumps were those?

A. Blind pumps.

Q. Then how could the customers see that this gas was a different color?

10 A. Those people coming and purchasing in five-gallon cans, which we had many that came in the station.

Q. If you looked in the can, could you see in the can the color of the gasoline?

A. You could when you are pouring it out from the can into the funnel.

Q. How many people do you suppose came to your place and purchased five-gallon cans of gasoline?

20 A. We have at least ten or fifteen that have boats in around there, and at that time were coming to our station.

Q. It wasn't any customer that had an automobile, was it?

A. No, otherwise would have never known it.

Q. You don't know why the customer didn't come back, do you?

A. Yes, sir.

Q. You do?

A. On account of the gasoline.

30 Q. I didn't ask you that.

A. Yes, sir.

Q. Now, you thought it was harmful to your business to have this oil in the gasoline; that is your contention, isn't it?

A. Yes, sir.

Q. Now, this morning in answer to your counsel's question, you said that you knew that there was oil

in the tank wagons at the time it was delivering gasoline to you, didn't you?

A. Yes.

Q. And you said that the reason you knew that was because you got up and looked into the tank wagon and saw the oil?

A. Yes, sir.

Q. That is correct, isn't it?

A. Yes, sir.

Q. Why did you let the tank man deliver you that 10 gas?

A. Just negligence on our part.

Q. Just negligence?

A. Yes.

Q. That is your only explanation?

A. Yes, it was our fault we let it go in.

Q. So that, notwithstanding the fact that you believed it to be harmful to your business, you bought and purchased this gasoline?

A. At that time.

20

Q. Now, you also complained about there being water in the gasoline, didn't you?

A. Yes, sir.

Q. And you also complained that was harmful to your business, didn't you, this morning?

A. Yes, sir.

Q. Now, concededly there was water in these tanks when they were originally installed; an allowance was made to you for that, wasn't it?

A. The allowance that I claimed, yes.

Q. That is the paper you introduced in evidence 30 this morning?

A. Yes.

Q. Now, after that time was there water in the gasoline?

A. Yes, sir.

Q. Frequently?

A. Frequently.

Q. Why didn't you write to Mr. Stone and complain about that?

A. I told Mr. Cox and I also told the drivers.

Q. Did you test the gasoline that was being delivered to determine if there was water in it?

A. We did.

Q. Did you find there was?

A. Yes, sir.

10 Q. Why did you accept it?

A. It was already in the tank. We didn't test it when it came in the tank wagon.

Q. Why didn't you test it when it was being delivered from the wagon?

A. Well, there was no trace then of water.

Q. Now, then, the water may have leaked in through seepage into the tank, mightn't it?

A. It might have.

20 Q. And it might have got in through condensation in the tank?

A. Perhaps.

Q. So that you wouldn't claim, would you, that the water was in the gasoline that was delivered you from the Atlantic Refining Company's wagon, would you?

A. Yes, I would.

Q. You would claim that?

A. Yes, sir.

30 Q. Then I want to know why it was you didn't test the gasoline when it was being delivered from the wagon?

A. Well, there was no reason that I can give outside of one day —

Q. Mr. Kelly, we are reasonable people, you were getting what you claim to be gasoline that had water in it, you were having trouble with it, it was inter-

fering with your business, that is your claim, isn't it?

A. Yes, sir, that is the claim.

Q. As a reasonable man, don't you think it was your business to inspect or test that gasoline before it was delivered to you?

A. No, I don't think so. I complained ——

Q. You just said I didn't ——

Mr. McGee: If the Court please, counsel is interrupting and isn't giving him a chance to answer. 10

A. —— several times to Mr. Cox and also to the drivers and they told me that ——

Q. But why did you let them hand you something that wasn't a salable product?

A. Well, we were just naturally dupes; that is the only answer I could give to that.

Q. You just said in your letter that you was not a dupe, you made that very plain to Mr. Stone. 20

A. That is before.

Q. There wasn't anything that really changed your mental viewpoint, was there, after that?

A. Yes, there was, you know you can be robbed so long, and then after that ——

Q. Well, all the time you were being robbed—pardon me, and I suppose you mean the wrong way—your business was increasing, wasn't it?

A. No, sir.

Q. No?

30

A. No, sir.

Q. Why doesn't the report seem to show that from January until the end of the season in September that it increased each month?

A. That is judging that particular year, but a year ago it decreased. You can't take gasoline in January and then take the sales in August.

Q. No, of course not. Now, as a matter of fact, Mr. Kelly, for two years prior to the time that you opened this gasoline station, you had a gasoline station right across the way, didn't you?

A. Yes, sir.

Q. And immediately after your crossing to this corner and opening this station, that same gasoline station was reopened, wasn't it?

A. Yes, sir.

10 Q. So then there were two gasoline stations where there had been one before?

A. Yes, sir.

Q. And it also turned out that the Standard Oil Company opened a station very close to you, didn't they?

A. That was in operation all the time.

Q. But it was taken over and operated by the Standard Oil Company itself, wasn't it?

A. Yes, sir.

20 Q. All of which were wholly competitive with your business, wasn't it?

A. Somewhat.

Q. If, at the highly competitive character of your business, you mean this company sell you gasoline that had water in it, is that what we are to understand?

A. Yes, sir.

Q. And they continued to do that right along through this whole contract?

30 A. No, I won't say through the whole contract. We were promised relief by Mr. Stone.

Q. Did you get the relief?

A. Yes.

Q. You did?

A. For the time being.

Q. When was it you got the relief?

A. Some time in July or June, when the new gasoline came.

Q. After that there was no trouble with water in the gas?

A. Not after June.

Q. Then it is not your claim that the reason why you abandoned the exclusive sale of this Atlantic gasoline was because there was water in the gas, was it?

A. Not solely because of water, because of poor 10 quality.

Q. Poor quality?

A. Yes, sir.

Q. Was it any poorer than it had been before?

A. It was not the same quality as the competitive oil company's.

Q. We are not particularly interested in that. We are interested in this product. Had it become poorer after you started purchasing it?

A. It was poor in the beginning, and then when 20 they came out with the new gas it was an increasing —

Q. Increasingly poor, you mean?

A. No, it was a little better, I would say, and then in the middle of the summer it started to go back.

Q. Did you complain about that?

A. Yes, sir; Mr. Stone was down himself and I complained verbally right to him.

Q. But you didn't do anything more except make a verbal complaint about it?

A. That is all. 30

Q. Well, did it continue to go back?

A. The quality remained the same.

Q. The same as when?

A. As in June.

Q. Then the quality was no different than when you contracted for it in the beginning, was it?

A. It was about the same.

Q. About the same as when you first contracted for it?

A. Yes, sir.

Q. So it didn't wind up with being any poorer than what you originally started to get when you signed the contract?

A. It got considerably poorer in the latter part.

Q. And then it got better again, that is what I am
10 talking about?

A. Yes, sir.

Q. So in the wind-up from July on it wasn't any worse than when you started?

A. No, sir.

Q. Now, you said that Mr. Cox never talked to you about this change after he saw the pump, is that correct?

A. I beg pardon?

Q. You said, as I understood you, that Mr. Cox,
20 after Mr. Cox saw you putting in that Tydol pump he never had any further conversation with you?

A. No, sir, never had.

Q. You told him to see Mr. Deher?

A. Yes, sir.

Q. Who was Mr. Deher?

A. The property owner.

Q. What property owner, the man who owned the gasoline station?

A. The man who owns the ground.

30 Q. Well, why was he to see him?

A. Well, for no reason at all outside of we were busy at the time and he came in like a roaring lion, and I just merely said, "Go see Mr. Deher."

Q. You could have invited him to see other people just as inaccessible, couldn't you?

A. Sure.

Q. Just as logical an answer, wouldn't it?

A. Just the same thing.

Q. So that really you didn't offer any explanation at all to him why you were making the change, did you?

A. He wasn't there long enough, he immediately ran in the office and grabbed the 'phone and called up Endicott & Endicott, and that is the last time I saw Mr. Cox.

Q. It wasn't but a few days after that when you heard from Endicott & Endicott, was it? 10

A. Shortly after that.

Q. By way of the institution of this suit?

A. Yes, sir.

Q. Now, I don't know whether the Court heard the roaring lions or not, but to get it into the record, I would like to know just exactly what you mean Mr. Cox said or did on this occasion?

A. Well, he didn't say a whole lot, he was excited for one thing.

Q. Well, he protested against your putting in this Tydol pump, didn't he? 20

A. Yes.

Q. Wasn't that it?

A. I can't say that he did.

Q. Didn't he object to it?

A. He said, "You can't do that."

Q. That is the protest, isn't it?

A. Well —

Q. Did he say why you couldn't do it?

A. No. 30

Q. Did he refer to the contract?

A. Not at that time, no, sir.

Q. And you didn't explain to him why you were doing it, either, did you?

A. No, sir.

Q. You didn't tell him you were doing it because

that they had violated their contract with you, did you?

A. No, sir.

Q. When did Mr. Cox refer to the contract?

A. Mr. Cox was talking to Dad.

Q. That was afterwards?

A. That was the same day, 23d day of December, or 24th.

Q. You heard him talking to your Dad?

10 A. No, sir, I was in the back.

Q. So all you know is what your father told you?

A. Yes, sir.

Q. Well, then, he didn't go right out again, did he?

A. Yes, he went out before I completed the customer I was working on.

By Mr. McGee:

20 Q. Mr. Kelly, at the time you went into your present location, was there any other gasoline station on Ventnor Avenue opposite Marvin Gardens or within a block of Marvin Gardens on the south side of Ventnor Avenue?

A. There was a station there, but I don't remember whether it was in operation or not.

Q. Did that give up operation about that time, or subsequently?

A. I think so.

Q. That is not in there now?

30 A. No, it has not been.

Q. Has not been for how long, to your knowledge?

A. For over a year.

Q. So, therefore, what you would have gained one way or lost another, you would have gained in the lease?

A. Yes, sir.

Mr. Richards: I object to that, if the Court please.

The Court: The Court will have to determine that.

Q. Did the tank truck of the complainant deliver gasoline very many times to you in which you detected fuel oil?

10

Mr. Richards: If your Honor please, this isn't re-direct.

The Court: No, I think you have covered that.

By the Court:

Q. How many pumps are on the property in question now?

20

A. You mean the Tydol question, your Honor?

Q. How many gasoline pumps are on there now, your total number?

A. Eleven.

Q. Four that were put on by this company and seven others?

A. Yes, sir.

By Mr. Richards:

30

Q. How many were on there when the Atlantic Refining Company?

A. Four.

Q. Now there is eleven?

A. Eleven, that is on the corner and on the adjacent.

By the Court:

Q. How many on the corner?

A. Four.

Q. Only the four of the Atlantic?

A. Yes, sir. No, four—eight all together.

Q. There is eight all together?

A. Yes, sir.

Q. Four Atlantic and four others?

10 A. Yes, sir.

JACK KELLY, SWORN.

Direct examination.

By Mr. McGee.

20

Q. Mr. Kelly, are you a brother of Louis Kelly?

A. Yes, sir.

Q. And were you contemplating or were you a partner of his in the service station, gasoline service station venture on Delevan and Ventnor Avenues, Margate City?

A. I had an agreement that I was to go into partnership between my brother and I.

30 Q. Do you know of an agreement that was entered into by you and your brother with the Atlantic Refining Company agreement?

A. Yes, sir, I know of the agreement.

Q. I show you Exhibit C3, and ask you whether or not this is the agreement which purports to be the one that was entered into by you and your brother?

A. That is the agreement in question, yes, sir.

Q. Is the agreement exactly the same as when you entered in it?

A. No, sir, it is not.

Q. What part, if any, is different from the one that you entered into?

A. When I read the lease or the agreement for the first time, there wasn't anything typed on there at all, was a blank.

Q. Wasn't anything typewritten?

A. No, sir.

10

Q. Did you see this agreement after it was filled in?

A. Yes, I saw it about a month afterwards.

Q. At that time is this present agreement the same as the one that you saw there?

A. At what time?

Q. At the time that it was filled in and returned to you by the representative of the Atlantic Refining Company?

A. It was about a month later, I know, but this is the same identical agreement. 20

Q. And if there is any changes that are different from that time —

A. There is a change.

Q. Where is it, and will you kindly show it to the Court?

A. There is the phrase typewritten that "In consideration of the investment required it is agreed that the above location shall be used only for the sale of Atlantic gasoline and Atlantic motor oils." 30

Q. That was not in the agreement?

A. That was not in the original agreement, no, sir.

Q. At the time it was handed to you?

A. No.

Q. Do you know Mr. Cox?

A. Yes, sir, I know him.

Q. Do you know whether or not an agreement was

entered into subsequent to the date of the Exhibit C3 pertaining to any discount or discounts with the complainant?

A. We made a verbal deal with Mr. Cox that if we would get two and a half cents rebate ——

Mr. Richards: I object, varying the terms of the written contract. There is no proof of the agency of Mr. Cox to make such an agreement.

10

The Court: I will admit it, but it must be connected up.

Mr. McGee: Connected up, if the Court please.

The Court: If it is not connected, it will have to be stricken.

20 A. (Repeated.) On their gasoline, we would sign up a hundred per cent their product, and that that was the reason we signed their agreement, because we were to get that additional half cent, other companies would only allow two cents, so that we were out for the extra half cent.

The Court: Now that develops, Mr. McGee, that the conversation was before the agreement.

Mr. McGee: Yes.

30

Mr. Richards: Then I ask it be stricken.

The Court: Yes, it will be stricken.

Q. I want to know, Mr. Kelly, what conversation you had with Mr. Cox about any discount or dis-

counts after or subsequent to this agreement referred to as Exhibit C3?

A. Mr. Cox said that we would get two cents rebate on a gallon, and if we should reach ten thousand gallons a month, we would get a half cent rebate.

Mr. Richards: This, of course, is subject to being stricken.

10

The Court: Yes.

Q. Did Mr. Cox tell you that half cent discount would be paid you or did he say he had to take it up with anyone?

A. He said he would take it up, and when he came back he told us everything was jake, all fixed up.

Q. Who did he take it up with, did he say?

A. Took it up with the Philadelphia office, main office. 20

Q. When did he come back?

A. I don't remember the date. About in the course of two weeks, perhaps, ten days.

Q. He told you would get your discount of one-half cent?

A. Yes, sir.

Q. Whenever you reached in any one month a total of ten thousand gallons?

A. Yes, sir.

Q. Do you know who Mr. Cox took this up with? 30

A. Only he took it up with the company.

Mr. Richards: Wait a minute, do you know? Answer that yes or no.

A. Took it up with the Philadelphia office.

Mr. Richards: Answer that yes or no.

The Court: The question is do you know with whom he took it up?

A. I didn't go with him to find out, your Honor.

Q. Subsequent to that conversation, did you secure credit or discount from the company?

A. We got the rebate for the first month, reached
10 the mark 10,000 gallons.

Q. What rebate?

A. Two and a half cents.

The Court: Right there, what month did you reach the ten thousand gallons?

A. The month of March, first month we were in business.

20 Q. You reached 10,000 gallons?

A. Yes, sir; I think a little over ten thousand.

Q. Do you know when this discount of one-half cent and two cents was discontinued, if at all?

A. When the half cent was discontinued?

Q. Or the two cents, yes.

A. The half cent was discontinued, I think, around May.

Q. Did you or your brother complain to Mr. Cox or any other representative of the Atlantic Refining Company about that being discontinued?

30 A. Yes, sir.

Q. What did you say to him?

A. We told him that that was the reason we signed up with them.

Q. When did you leave the service station?

A. I left in July.

Q. You left in July, 1928?

A. Yes, sir.

Q. And moved out of the city?

A. No, sir; I remained in the city for a while.

Q. During the time between March and July, do you know of any complaints that were made to you about the gas?

A. Quite a few, yes, sir.

Q. And were those complaints conveyed to Mr. Cox?

A. Yes, sir, they were conveyed. 10

Q. What did you tell Mr. Cox about the complaints that you received?

A. The nature of the complaints?

Q. Yes, what did you tell him about them?

Mr. Richards: I object. I don't think that is competent evidence, what somebody complained about.

The Court: No, but it is what he said to Mr. Cox. 20

Mr. Richards: I know, but even if he said it to Mr. Cox, the question is whether the quality was all right or not. Now, the complaint, conveyance of the complaint wouldn't be evidential, the fact would be.

The Court: What he said to Mr. Cox may be evidential of Cox's answer and reply thereto, may have some weight. 30

Mr. Richards: Yes, but if your Honor please, suppose you had bought some gas here and went back and complained about it, the mere conveyance of your complaint to Mr. Cox wouldn't be evidential.

The Court: Not of itself it isn't.

Mr. Richards: That is what I am complaining about in this question.

The Court: If it can be connected I will admit it. The question is what you told Mr. Cox.

10 A. Told him that water was in the gas and also contained dirt, and we told him that the gas was discolored, had a very dirty color.

Q. What did Mr. Cox say to you?

A. He said he would analyze the gas and find out and let us know, took samples to that effect.

Q. Were you there at the time he took samples?

A. Yes, sir.

Q. Did he return with a statement of the analysis?

A. Never heard anything about the analysis.

20 Asked him about it.

Q. You asked Mr. Cox about it?

A. Yes, sir.

Q. What did he say?

A. Had no answer, never heard from him. They were in the laboratory or something.

Q. Said he hadn't received any answer from them?

A. Yes, sir, he hadn't received any answer from the company, but the samples were in the laboratory.

30 Q. Did you examine this gasoline yourself?

A. Not from a chemical standpoint.

Q. I mean as to the color?

A. As to color, yes, sir.

Q. See any dirt in it?

A. Yes, sir; it was very dirty, even grit in it.

Q. Did you—what made you notice the color of it?

A. Well, there were people coming around to buy a gallon of gasoline in a glass jug, they wanted to clean a dress or whatever they wanted to do with it, wanted to use for cleaning purposes, we were not able to sell them that gas any more because it was so dirty they wouldn't be able to clean their garments in it, and go out somewhere else and get gas.

Q. Do you know what discolored the gasoline?

A. Only thing was the fact that they were using the same trucks to deliver gasoline in as they used 10 for this fuel oil, giving it a dirty color.

Q. To your knowledge did you lose any customers of yours who had made complaints to you?

A. Yes, we have lost customers.

Q. Did the business fall off generally?

Mr. Richards: I object.

A. Considerably.

20

The Court: Sustain the objection.

Q. Mr. Kelly, did you sign this contract?

A. No, sir.

Q. Did you appear before a notary public?

A. No, sir.

Mr. Richards: That is objected to.

The Court: Sustain the objection.

30

Mr. Richards: There is no contention he did.

Mr. McGee: If the Court please, while on that, I contend that inasmuch as this contract has been offered in evidence, that I have, I understand, the right to examine upon any part of it.

The Court: The contract has not been offered in evidence insofar as the acknowledgments therein purporting to be, are concerned, that was excluded at the time, and counsel stated that the acknowledgment was improper. I don't see any occasion to take time on it.

Mr. McGee: You mean counsel for the Atlantic Refining Company?

10

The Court: Stated very emphatically at the time.

Mr. Richards: That it is not contended that this gentleman signed the contract.

Mr. McGee: With that, if your Honor please, it is not as I understand it, still that does not preclude the defense from examining as to how that was placed upon that record.

20

Mr. Richards: Yes, it does.

The Court: I have ruled upon it quite a number of times, and we will not go into that. If you want to show that it was properly acknowledged and desire that to be admitted, I will permit you to do it, but will not take the time to show that it was improperly acknowledged when that is stated in open court.

30

Cross-examination.

By Mr. Richards:

Q. Mr. Kelly, you say that the gas had water in it and had dirt in it and that it had an oily color; right?

- A. Yes, dirty color.
- Q. Now you say that you complained about that?
- A. Yes, sir.
- Q. To Mr. Cox?
- A. Yes, sir.
- Q. And Mr. Cox took several jars of it away to be analyzed, is that right?
- A. Yes, sir.
- Q. When did this occur?
- A. Before we made the complaint. 10
- Q. I know, but when was that?
- A. Don't recall the date.
- Q. Well, what month was it?
- A. I guess May.
- Q. In May?
- A. Yes.
- Q. Or it may have possibly been in April or June, let's have plenty of leeway about it.
- A. More like June, late May or early June.
- Q. Suppose we have a spread of enough time, 20 it was some time possibly between the first of April and first of July?
- A. Yes, sir.
- Q. It wouldn't be after July nor possibly before April?
- A. There were complaints after July, yes, sir.
- Q. There were complaints, but I mean when this incident occurred?
- A. When samples were taken?
- Q. When Mr. Cox took the samples up to the 30 laboratory?
- A. I think that was June.
- Q. I was giving enough spread, then it was before the first of July, we have got that fixed, have we?
- A. Right.
- Q. At that time you complained because there was water in it, you complained because it was dirty

and because it had this dirty color; that is correct? And the only reply that Mr. Cox made to you was that he would take it up and have it analyzed?

A. Yes, sir.

Q. Well, you could see that the dirt was there, couldn't you?

A. You could see it when you were serving it into these glass containers, glass jars.

Q. You didn't have to take it any place yourself
10 to Philadelphia to have it analyzed for the dirt, did you?

A. The samples were not taken for analysis of the dirt.

Q. What I am asking you now, your complaint was about dirt, gasoline wasn't analyzed for the dirt, was it?

A. No.

Q. You could see the color, you complained about the color, you could see the color, could you?

20 A. Yes, sir.

Q. It was not being analyzed for the color, then, was it?

A. Not at that time.

Q. You could have both seen and very easily have detected that water without analyzing it, couldn't you?

A. Well, we hadn't any chemist down there.

Q. You didn't need a chemist to tell whether there is water in gasoline, did you?

30 A. Shouldn't, no.

Q. Because it will, it separates from the gasoline, doesn't it, and lies there quite permanently if you put it in any kind of a vessel?

A. Probably on the bottom, sure.

Q. So if you took a jar of this gasoline out of your pump and there was water in it, the water

would be down at the bottom of the jar and you would see it there, wouldn't you?

A. Yes, sir.

Q. What was it to be analyzed for?

A. Well, we were to get the analysis on it.

Q. For what reason?

A. How much water would appear.

Q. You didn't need that when you could see it, Mr. Kelly?

A. I didn't say I saw the water in there. 10

Q. If there had been water in there, you would have seen it. You just admitted that a minute ago. So we are up to the position of your telling the story about this gasoline going to be analyzed, when it turns out there is apparently nothing you couldn't see right then and there, didn't require any analysis, did it?

A. Yes, sir, as to dirt in there.

Q. Then I want to get at the point myself, what was all this talk about the analysis business? 20

A. That was Mr. Cox's suggestion to take it to the laboratory and give us a report on it.

Q. What could you analyze in it, you couldn't analyze the dirt, couldn't analyze the color, couldn't analyze the water, that was perfectly apparent, wasn't it?

A. Yes, sir.

Q. What I am getting at is why this talk about analyzing.

A. We didn't ask them to analyze it. He told us he was going to take it and have it analyzed. 30

Q. Your complaints were such that you did not need to be put off with the statement it was going to be analyzed, did you?

A. No.

Q. The gasoline was dirty and you didn't want dirty gasoline?

A. No, sir.

Q. You didn't want dirty gasoline because it was not salable, is that right?

A. Yes, sir.

Q. You didn't want gasoline with water in it because that wasn't salable, that is right?

A. Yes, sir.

Q. Now, then, I want to ask you the same question that I asked your brother, why was it that you
10 accepted the delivery of gasoline that was dirty?

A. We were not able to tell whether it was dirty or half water until after it was pumped out of the tank.

Q. When it was being delivered to the tank you could see it and look at it, couldn't you?

A. Couldn't see if there was water in it.

Q. Why not?

A. Tank is so large and there is no way to judge the amount of water in it.

Q. Wasn't it very simple, you had had these complaints, hadn't you?
20

A. Yes, sir.

Q. You had complained to them about the dirty gasoline and about the water, hadn't you?

A. Yes, sir.

Q. When the tank man came up there with the tank, wasn't it very easy for you to take any kind of a receptacle and have him pour some of it in that receptacle so that you could examine it?

A. You can take a specimen at the top, but he had
30 the same thing —

Q. Yes.

A. You wouldn't get any water then.

Q. Why not?

A. Because the water would be on the bottom, I know, taking it out from the top.

Q. Then if you waited until the tank was nearly

empty and took a sample of it, you would get the water, wouldn't you?

A. Should be able to.

Q. You never did that, did you?

A. No, sir.

Q. You never stopped them from delivering dirty gasoline, either?

A. That is not the way we received gas. We would buy a certain amount and measure it in our tank, and we didn't know the quality of the gas until after 10 it was in our hands.

Q. It was easy for you to determine that when it was being put in the tanks, when you pumped it out of the tank, wasn't it?

A. Well, that wouldn't be right, that gas isn't in our possession if it is on the tank wagon, when it goes in the tank then it is.

Q. Let's don't try to fence with each other, Mr. Kelly. It is a perfectly simple proposition, it was just as easy for you to determine the quality of this 20 gas when it was being delivered to you and put in the tank as it was when you pumped it out of the tank afterwards, wasn't it?

A. Not likely, no, sir.

Q. Wasn't it just as easy to ascertain it, you could have ascertained it just the same, couldn't you?

A. If you suspected it.

Q. Well, you had reason to suspect it according to your story, certainly?

A. We were informed we would get better gas. 30

Q. If you had gone down to the adjacent A. & P. store and bought a pound of butter and turned out to be rancid, the next time you went in there you would have had a suspicion about it, you would have smelled it and found out whether it was rancid or not, wouldn't you?

A. Most likely.

Q. If these people had handed you a lot of bad gasoline, you were on notice, suspected it, wouldn't you have investigated it before you let them hand you another load?

A. I wouldn't run up in their wagon and take samples out of their wagon.

Q. Did you have to take samples out of their wagon? The wagon was backed up, I presume, to the neighborhood of your tank and poured by means
10 of a flexible hose from the wagon to the tank, wasn't it?

A. Yes, sir.

Q. Then it was very easy to take a sample out of the tank as it flowed from the hose, wasn't it?

A. No, sir, you couldn't do that.

Q. Why not?

A. Run too fast, run all over.

Q. You can govern the motion, can't you?

A. I don't know much about the trucks, whether
20 it can be let out slowly or fast or not.

Q. Then, there is another thing about that, you have seen these tanks often enough, haven't you, these tank wagons?

A. Yes, sir.

Q. And they are divided into compartments, are they not?

A. This particular tank is.

Q. And there is a hose situated in the bottom of the compartment, isn't there?

30 A. Yes.

Q. And the gasoline flows out of the bottom of the compartment through the hose into your tank which is connected with the gasoline pump?

A. Yes.

Q. That is the system, isn't it?

A. Yes, sir.

Q. Why shouldn't you have found out, then, if

there was water in the gasoline immediately upon its delivery?

A. You mean why couldn't I get up in that wagon and look in there?

Q. You didn't have to look in it. The very first thing that would have come out of the tank would be the water, wouldn't it?

A. You can't see that. The nozzle is sunk down in the tank.

Q. You suspected the water, why didn't you borrow a five-gallon can such as you undoubtedly had handy there and tell the tank man to pour that full of the gas he was about to deliver? 10

A. I have always been too busy to do that.

Q. But this was something that was serious to your business, Mr. Kelly, or your brother's business?

A. Yes, sir.

Q. Or is it a fact, Mr. Kelly, that this idea about the dirt and about the water is an afterthought, 20 after deciding you wanted to get rid of this contract?

A. No, sir, that is the reason we are complaining, on account of the water and the dirt in the gas.

Q. But which you were too busy to investigate when it was being delivered to you?

A. Too busy to get up on tank wagon.

Q. You didn't have to get up on the tank wagon, I just pointed that out. I don't see how else you could do it.

Q. All you had to do is to take a sample as it 30 flowed from the hose right at the beginning and fill up a five-gallon can with it before you put the rest of it in the pump tank, didn't you?

A. You could fill up a five-gallon can from the back of the tank.

Q. And the very first thing that would have come out would have been the water?

- A. Should be on the bottom, yes, sir.
- Q. And if it was dirty, that would have been apparent in the can, wouldn't it?
- A. Yes, sir.
- Q. If it had been discolored it would have been apparent in the can?
- A. Yes, sir.
- Q. None of these things you did?
- A. Didn't do that, no.
- 10 Q. Now, you also say that you were to get a half cent extra for every ten thousand-gallon lots, that is, after you reached 10,000 gallons per month, you were to get an additional half cent rebate?
- A. Yes, sir.
- Q. That was what Mr. Cox told you?
- A. Yes, sir.
- Q. You say you got that during the month of May and you never got it after May?
- A. Month of March.
- 20 Q. What?
- A. That was the month of March we got a rebate, the first one.
- Q. And you got the rebate in May, is that right?
- A. I don't know when the check came in.
- Q. It was after the month of March?
- A. After the business month of March, yes, sir.
- Q. You didn't get it in April, you didn't get it in May or June?
- A. Not that I know, no, sir.
- 30 Q. Just the month of March?
- A. I only know the one month.
- Q. Now, Mr. Cox says that he told you and your brother was that you would get an additional one-half cent per gallon on all your gasoline the same as other dealers were getting. Now, wasn't that what he told you?
- A. Didn't say anything about other dealers, he

said were to get a half cent for anything over ten thousand gallons.

Q. Did he say anything about ten thousand gallons at all?

A. Yes, sir.

Q. Sure of that?

A. He said if we got out and hustled up business and can do 10,000 gallons a month, we will get two and one-half cents rebate.

Q. Did he say how long that would last? 10

A. No, sir.

Q. Didn't he say he didn't promise it to you forever, did he?

A. He didn't specify any time at all.

Q. Now, as a matter of fact, in the month of March you only sold 8,060 gallons, but you got the half cent?

Mr. McGee: If the Court please, the testimony isn't that. 20

Mr. Richards: It is.

The Court: That is not my memorandum at all.

Mr. Richards: Your memorandum is 6000.

The Court: 6,939, I thought was the testimony.

Mr. McGee: Of Mr. Kelly? 30

The Court: No, of Mr. Cox.

Mr. McGee: Mr. Kelly testifies to 10,112 gallons, and that was when the half cent was paid.

Mr. Richards: If your Honor please, you remem-

ber that Mr. Cox was reading off the straight gas at that time and did not give you and is not in the record the Ethyl gas.

The Court: That is the point exactly, it is not in the record.

Mr. Richards: With the Ethyl gas the amount was 8,060 gallons.

10 Q. What I am now asking you is whether or not in the month of March you did reach 10,000 gallons?

A. We must have reached it or they would not have rebated us that half cent.

Q. If their records show that you did not reach ten thousand, and it is so that they did rebate it, we all agree that they did rebate it, then is your allegation changed as to the one-half per cent conversation?

20 A. I never heard anything—you mean when was that half cent?

Q. What is the point about it, Mr. Kelly? Mr. Cox says that you were to get the one-half cent per gallon rebate irrespective of whether it reached ten thousand gallons or not. He doesn't say it in that way, but he says you was to get it on the sale, doesn't say anything about any ten thousand gallons. What I am getting at is whether you are correct in saying that you were only to get it if you sold more than ten thousand gallons, or were to get it whether you
30 sold one gallon or ten thousand gallons.

A. We were told we would get the half cent on ten thousand gallons or over per month.

Q. Then you deny that Mr. Cox was to give you the one-half cent if you did not reach ten thousand gallons?

A. We were not to get that extra half cent if we did not reach ten thousand.

Q. You did get it?

A. Why?

Q. That is what I want to know. How about this contract, I suppose you don't know where the original copy is, either, do you?

A. No, sir.

Q. Didn't keep it around the place?

A. No, sir.

Q. Can't find it anywhere?

A. No, sir.

Q. When you saw this Exhibit C3, was there anything written on it at all, typewritten on it?

A. Nothing typed on there when I saw it the first time.

Q. Nothing typewritten on it all?

A. No, sir.

Q. You saw your brother sign it in blank, is that it, or didn't you see him sign it?

A. I saw him sign it.

Q. Were you present when he signed Louis and Jack Kelly?

A. I was there, yes, sir.

Q. Why didn't you sign it?

A. It was not given to me to sign. I wasn't asked to sign it.

Q. Did you know that he was signing your name to it?

A. I knew he was signing Louis and Jack Kelly because that is the way Mr. Cox told him to sign it, sign his name under it.

Q. And you stood by and let him do that, isn't that right?

A. Yes, sir, sure.

(Further testimony adjourned until Friday at 11 o'clock A. M.)

Atlantic City, N. J.

September 20, 1929.

(Trial of cause resumed at 2:15 P. M.)

10 SCOTT H. ADAMS, SWORN.

Mr. McGee: If the Court please, I want to make a statement about this witness. My purpose for putting him on the stand—this is the notary public, if you will remember, in the acknowledgment, and my purpose is to show the bad faith in the complainant in that one of their agents had this acknowledgment taken without the knowledge of the defendants and also to show that the complainant is not coming into
20 this court with clean hands.

The Court: You expect to show that that agent did this act with authority from the complainant?

Mr. McGee: I intend to show that from his own—he has testified here that he is an agent and that he has under other circumstances, if the Court feels it necessary, has recorded other instruments in other
30 matters.

The Court: I will hear you, Senator.

Mr. Richards: If your Honor please, the thing doesn't concern us particularly. There is no question of bad faith involved. This paper did not require to be acknowledged. Now the fact that the

offer now is to show that this man took the acknowledgment without having these people before him is not evidential in this case. Of course this man may have committed a crime in so doing, but I am not bound by it, the Atlantic Refining Company is not bound by it, unless they are prepared to show it was done with the knowledge and consent of this company.

The Court: That is the question I just asked 10
counsel, if he intended to connect it up with the
company.

Mr. McGee: If the Court please, I will, I think,
connect it up with the—show by records in another
case that they have under the same circumstances
an acknowledgment was taken, and I think was veri-
fied after that and then really that is customary or
that is what has been done in several instances.

20

Mr. Richards: If your Honor please, what has
been done in some cases is certainly not evidential
in this case.

The Court: No, that is true. The only thing is
counsel practically says he expects to connect it up.

Mr. Richards: If he does he ought to connect it
first, let him connect it first.

30

The Court: That is true. Unless you connect any
act with the company I can't see how it is admissible.

(Witness withdrawn.)

SCOTT H. ADAMS, recalled.

By Mr. McGee:

Q. Mr. Adams, did you take an acknowledgment to a contract between the Atlantic Refining Company and Dorry Adams?

10 Mr. Richards: That is objected to.

The Court: Of course, if he didn't see the parties he didn't take the acknowledgment.

A. I saw them.

Mr. McGee: As I understand from the witness, he saw them later on.

20 The Court: You mean after the acknowledgment?

Mr. Richards: This is Adams, some other party. I don't think your Honor caught it.

The Court: I didn't catch it.

30 Mr. McGee: If the Court please, I want to show that a district manager who has testified as such brought certain papers to this man for that particular purpose and that these papers afterwards were recorded and is a matter of record in the Court of Chancery at the present time.

The Court: How can that be admissible, if this man legally took the acknowledgment it is proper, if he didn't take it there is no acknowledgment taken.

Mr. McGee: The notary sets forth that he did take the acknowledgment, as far as the legal effect of that is concerned I will admit it couldn't affect the defendants in any way, but they took advantage of that and it was recorded.

The Court: In some other case?

Mr. McGee: Yes, sir.

10

The Court: Sustain the objection.

(Witness withdrawn.)

IRA WOOD, sworn.

Direct examination.

20

By Mr. McGee:

Q. Mr. Wood, where do you reside?

A. 7 South Kenyon, Margate.

Q. Do you know Mr. Kelly, Louis Kelly?

A. I do.

Q. Did you ever do any business with him?

A. I have.

Q. What business did you do with him?

A. I bought gas off of him.

30

Q. Do you know what products were being sold or what the gas, what company's gas he was selling at that time?

A. At what time?

Q. At the time you purchased it, made these purchases from him?

A. Well, I have dealt with him for about the last three years, I believe.

Q. Did you make purchases from him between February of 1928 to the present time?

A. I have.

Q. Did you make any purchases from him in March of 1928?

A. Yes.

10 Q. And what gasoline, what company's gasoline was sold to you?

A. March of this year?

A. March, April, May, in May up until December.

Q. Did you purchase —

Mr. Richards: Wait a minute. Let him answer the question if he can.

A. Atlantic gas.

20 Q. Did you make any complaints to Mr. Kelly about that gasoline?

A. Why, I think twice.

Q. What was the cause of your complaint?

A. Well, my motor stalling. Well, the gas wasn't satisfactory, that is what I told him.

Q. Did you use any other gasoline in between times?

A. No, I didn't. I dealt entirely with Lou, Mr. Kelly.

30 Q. Did you use any other gasoline later on after you were having this trouble with your motor from the use of Atlantic gasoline?

A. Yes, I did. I tried it twice and after that I went to a different gas.

Q. Was there anything mechanically wrong with your motor to your knowledge?

A. No, sir, my car was in very good condition, I believe, at that time.

Q. And with the use of this new gasoline, how did your motor function?

A. The same as it always had before.

Q. How was that? Operate smoothly?

Mr. Richards: I object.

The Court: Sustain the objection.

A. I never had any trouble with it before that. 10

Q. But you did have trouble when you were using Atlantic gasoline?

Mr. Richards: I object.

A. I did.

Mr. Richards: I object and ask it be stricken.

The Court: What is the objection? 20

Mr. Richards: First place, leading, and, secondly, was not his testimony. He hasn't testified that he had trouble.

The Court: He stated that the motor stalled. I don't know whether that is having trouble or not.

Q. Do you know what caused your motor to stall during the time you were using Atlantic gasoline? 30

The Court: I don't want to interrupt you, Mr. McGee, but what difference can that have?

Mr. McGee: If the Court please, we contend that the quality of the gasoline —

The Court: Suppose that is all true, is there any guarantee anywheres in the contract except that they will furnish the Atlantic gasoline?

Mr. McGee: If the Court pleases, the cases all seem to hold, in Feigenspan against Beaslake, which is a beer case —

The Court: That is a case where they guaran-
10 teed to serve a particular or a certain standard.

Mr. McGee: I don't think there was any specific standard stated, if your Honor please, just lager beer sold by Feigenspan. These people say all products consisting of gasoline and motor oils sold by —

The Court: Maybe I am not saving time by interrupting, so I will let you go ahead.

20 Mr. Richards: If your Honor please, it has always been in my mind, didn't make any objection, but I was waiting to see what this was and then move to strike it at the end of the testimony if it didn't lead to some place.

The Court: You may proceed.

(Question repeated.)

30 A. Well, the last time it did it with me.

Mr. Richards: The answer is yes, but go along, Mr. Wood. Do you know?

A. Yes.

Q. What was it, Mr. Wood?

A. Water.

Q. How do you know that?

A. Well, I took the car to the Sheridan's service, and they told me there was water in the carbureter.

Mr. Richards: I ask that be stricken.

The Court: That will be stricken.

Q. Not what anybody told you, but what you saw 10
yourself.

A. I stood there and saw them take it apart.

Q. Did you see them take water out of it?

A. Well, he showed it to me and said, "This is water." That is on the filter.

Q. Could you tell whether or not it was water?

A. Looked to me like water.

Mr. Richards: If your Honor please, may I ask
the whole testimony be stricken? 20

The Court: Let it be stricken.

Mr. Richards: And I also move the entire testi-
mony of the witness be stricken.

The Court: No, I won't go to that extent. I don't
recall anything that is of probative force.

Cross-examination. 30

By Mr. Richards:

Q. When did you buy this gasoline of which you
complained?

A. Well, the last time I think was around the first
of November.

Q. What year?

A. Last year.

Q. 1928?

A. Eight, yes, sir.

Q. You were first asked by Mr. McGee what gas you had purchased and you hesitated and did not answer for upwards of over a minute. Why couldn't you remember what gas you had been using?

10 A. Well, the only reason that I can give, I purchased gas from them on the other side of the street.

Q. Did you buy all of your gasoline from Mr. Kelly?

A. All that I purchased when I was in Atlantic City.

Q. Well, did you get your car filled up at other service stations?

A. Maybe once or twice.

Q. Now, can you remember the first time you had trouble with the gas?

20 A. I can't say for sure, I think it was in March, in March—April —

Q. Once in April and once in November?

A. No, I had other trouble, too, but I never, it just stalled with me and then I started over again and ran all right then.

Q. Why did you keep on buying the gas, then?

A. Well, I always got good service there, and it was right near home.

30 Q. And you continued to buy the gas after you had this trouble, didn't you? You have never left Kelly. You are still dealing with him, aren't you?

A. I deal with him now, yes, sir.

Q. So that you did not cease to deal with him because of this trouble about the gas, did you?

A. I did the last time.

Q. You did?

A. I did.

Q. You just told us you kept on dealing with him.

A. Well, up until the last time I had the trouble.

Q. You mean you haven't purchased any gasoline from him since November of 1928?

A. No.

Q. You haven't?

A. I didn't say I hadn't. I have since.

Q. Can you tell how long before you had this alleged trouble with the gas that you had purchased gas from some other service station?

10

A. I don't understand you.

(Question repeated.)

A. It had been quite some time because I had not been out of town.

Q. What?

A. It had been quite some time because I had not been out of town.

Q. Didn't you always buy all the gas that you bought in Atlantic City from the Kelly station?

20

A. I did when I was home here.

Q. Never bought it any other place?

A. Not to my knowledge.

Q. When was it that you found that this water was in the gas?

A. November sometime, I believe.

Q. Did you purchase any more Atlantic gas after that?

A. Not for a while after that.

30

Q. Did you buy some more Atlantic gasoline after that?

A. Just a couple of times.

Q. Where did you buy the gas that you bought after the November incident?

A. After November?

- Q. Yes.
A. At, I believe, this Newport Garage.
Q. How long did you continue to buy your gas there?
A. I don't just remember offhand.
Q. When did you begin again to repurchase Atlantic gas from Mr. Kelly?
A. I don't think I bought very much since then.
Q. Do you know whether you did or not?
10 A. I can't say for sure.

WOODRUFF D. HAND, SWORN.

Direct examination.

By Mr. McGee:

- 20 Q. Mr. Hand, where do you reside?
A. 7101 Winchester Avenue.
Q. Do you know Mr. Louis Kelly, one of the defendants?
A. I beg pardon.
Q. Do you know Mr. Louis Kelly?
A. I do.
Q. Did you ever transact any business with him?
A. Bought gas of him, yes.
Q. What company's gas did you purchase?
30 A. The Atlantic, but I did business with him before he had that in there.
Q. You did business with him prior to the selling Atlantic?
A. Yes, sir.
Q. And you purchased Atlantic gasoline?
A. Yes, sir.

Q. When did you purchase Atlantic gasoline from him?

A. When he moved from his own place, I don't know the exact time when he moved, from his old place over to the new and put the Atlantic in.

Q. To the location he now has, Delevan and Ventnor Avenues?

A. Yes, sir.

Q. Did you have any trouble with your car after you purchased that gasoline? 10

Mr. Richards: If your Honor please, I think we might as well ——

A. Yes.

Mr. Richards: ——have the objection in now to this, because I can't see ——

20

The Court: Let me see the citation.

Mr. McGee: 71 New Jersey Equity, 382, taken to the Court of Errors and Appeals and sustained.

Mr. Richards: Isn't that the case where they compelled him to purchase, is that the case you are referring to?

Mr. McGee: That is right. 30

Mr. Richards: That is not an authority in this case.

Mr. McGee: It is a thorough dissertation on the principles involved in these cases.

The Court: Where is there anything in that which would indicate that the complaint —

Mr. McGee: It is near the last paragraph of the opinion, if the Court please.

10 Mr. Richards: My recollection is that case is merely authority for the proposition that Feigenspan did not have an adequate remedy at law. It was either that or one of the other similar cases that they declined to discuss the question of the quality of the beer.

The Court: That was my recollection.

Mr. McGee: If the Court please, in that case I think I can find it for you, where Vice-Chancellor Pitney states the rule.

20 The Court: He speaks of it, says "there was no attempt to prove the beer furnished was of a poor quality. The fact is being observed the defendant knew what sort of beer he was getting, because his predecessor in title had been selling Feigenspan's beer." I will sustain the objection. I don't think it makes any difference.

30 ALFRED HENTZEL, SWORN.

Direct examination.

By Mr. McGee:

Q. Mr. Hentzel, where do you live?

A. Mays Landing.

Q. Do you operate a business?

A. Service station.

Q. Where is that located?

A. At Egg Harbor.

Q. What company's gasoline and motor oils do you use?

A. Atlantic Refining, the Gulf Refining and Tydol, that is all.

Q. When did you first purchase Atlantic Refining gasoline?

10

A. Well, I don't remember the exact date, but it has been about two years ago.

Q. About two years ago, that was in the fall of 1927?

A. I think so.

Q. What discount, if any, was allowed to you by the Atlantic Refining Company after October, 1928?

A. Well, I don't remember the date that it was changed, I started in with two cents and then it was changed to one cent.

20

Q. What do you mean two cents, Mr. Hentzel?

A. Below tank wagon.

Q. Did you receive in November or October, November and December of 1928, two cents below the tank wagon?

A. I can't remember the dates. No, I didn't at that time.

Q. Did you receive it in January?

A. Of 1928?

Q. Yes.

30

A. I believe I did.

Q. Have you ever been asked to return that money to the Atlantic Refining Company?

A. No, sir.

Q. You are not what is known as a hundred per cent station, are you?

A. No, sir.

Cross-examination.

By Mr. Richards:

Q. Originally were you a hundred per cent station?

A. Yes, sir.

Q. At that time you dealt exclusively in Atlantic gas?

10 A. Yes, sir.

Q. At that time you received a rebate of two cents a gallon?

A. Yes, sir.

Q. Now, when was it that you began to receive the one cent rebate?

A. When I combined the two stations. I had two stations originally, and I combined the two stations.

Q. And when you ceased to be a hundred per cent station you got only a one cent rebate?

20 A. Yes, sir.

Q. That is correct?

A. Yes, sir.

By Mr. McGee:

Q. In January, Mr. Hentzel, were you a hundred per cent station in January, 1929?

A. 1929, no.

Q. Were you receiving anything then?

30 A. One cent.

FRANCIS J. MULHOLLAND, SWORN.

Direct examination.

By Mr. McGee:

Q. Mr. Mulholland, did you operate a service station for the sale of gasolines and motor oils?

A. Yes, sir.

10

Q. Whose products did you sell in the year of 1928?

Mr. Richards: Is this going to be the same offer of testimony, same line as the preceding witness?

Mr. McGee: Yes.

Mr. Richards: I am not going to object to it. I couldn't tell what was coming at first, but the question here is whether they are obliged under this contract to sell our product exclusively. Now what contract dealings they have with anybody else is not material to this issue unless the offer of proof would be to show that they did not sell at the tank wagon price. The other witness didn't so testify on the question of rebates.

20

The Court: I will sustain the objection.

Mr. McGee: If the Court please, I just want to remind the Court that there was a parol agreement that was testified to and the purpose of this witness is to show that that was, that it was sold to other stations at a lower figure than they were to us.

30

The Court: You haven't made any such offer as

that at all. If that is the offer, the tank wagon rate was a lower rate with others than with him, I will admit it.

Mr. Richards: Your Honor please, I want to point out that there is no such parol agreement.

The Court: There is testimony that there was, but it is a question to be determined.

10

Mr. Richards: That, however, has not yet been connected, and still subject to a motion to strike.

The Court: Certainly.

Mr. McGee: It may be on the next question I can dispose of this witness.

Q. Did you have—what gasoline did you sell?

20

A. Atlantic.

Q. Did you have a hundred per cent station at that time?

A. According to the Atlantic Refining Company I did, but according to myself I did not.

Q. Up until what time did they claim that you had a hundred per cent station?

A. Oh, before and until I was disposed from the property, and ceased selling Atlantic gasoline.

30

Mr. McGee: I just wanted to call Mr. Kelly, if the Court is willing, as to the testimony regarding the counter-claim.

LOUIS KELLY, recalled.

Direct examination.

By Mr. McGee:

Q. Mr. Kelly, did you keep books of record in your service station or for the business of your service station? 10

A. No, we don't keep books, just keep the records on the slips.

Q. What do you keep?

A. We keep each and every company's slips.

Q. I show you a lot of slips and ask whether or not these are for gasoline that you received?

A. Yes, sir, these are the Atlantic Refining Company's.

Q. For what months do those slips include?

A. They include from the time we began the station in March, 1928, the official opening up, to and including December 31st, 1928. 20

Q. Mr. Kelly, you testified that you had an agreement with the Atlantic Refining Company that they would allow you two cents a gallon under tank wagon, and one-half cent a gallon at any time you reached the sale of ten thousand gallons in any one month?

A. Yes, sir.

Q. Does the Atlantic Refining Company at this time under that agreement owe you any money? 30

Mr. Richards: I object to that question.

A. Yes, sir, they do.

The Court: I will permit the question.

Mr. Richards: It is a conclusion, of course. State what the facts are.

The Court: Of course, but just a preliminary question.

Q. What is due you, if anything, from the Atlantic Refining Company in the month of March, 1928?

A. They paid that month, 1928.

10 Q. April, 1928.

A. We didn't reach the quota that month.

Q. Nothing is due you?

A. Nothing is due us.

Q. May?

A. May, the Atlantic Refining Company owes \$50.19.

Q. How did you arrive at that?

A. The additional half cent that they agreed to pay us.

20 Q. How many gallons of gasoline did you sell in that month?

A. Month of May we sold 10,037 gallons.

Q. Now, in the month of June, 1928, was there any money due you?

A. There is no money due us because we didn't reach the quota.

Q. In the month of July?

30 Mr. Richards: Now, if your Honor please, the witness is reading from a memorandum, the nature of which we don't know, which was the cause of not getting the testimony out before, and I object to it.

The Court: Sustain the objection.

Q. Mr. Kelly, these figures in your own handwriting?

- A. Yes, sir, they are.
- Q. Where did you take them from?
- A. Took them from the Atlantic Refining Company slips.
- Q. Have you those slips attached to that?
- A. Yes, sir.
- Q. To each memoranda?
- A. Yes, sir.
- Q. Month by month?
- A. Month by month. 10
- Q. Are those the slips for the month of March, 1928, referring to —

The Court: March is out. He said he has been paid.

- Q. May? Are they the slips?
- A. Yes, sir.
- Q. That were given to you by the Atlantic Refining Company? 20
- A. Yes, sir.
- Q. On the purchase of gasoline from that company during May, 1928?
- A. During May, yes, sir, 1928.
- Q. Do they state the number of gallons of gasoline you purchased from the complainant?
- A. Yes, sir.
- Q. What were the number of gallons of gasoline you purchased from the complainant?
- A. The total amount in May was 10,037 gallons. 30
- Q. What amount, if anything, is due you from the Atlantic Refining Company on account of purchase made in May, 1928?
- A. \$50.19.
- Q. When was the next month on which the agreed discount was not paid to you?

Mr. Richards: That is objected to.

A. July.

The Court: Sustain the objection.

Q. In what month, if any, were there any other discounts due you from the Atlantic Refining Company?

10 A. Discount was due us in May, July, August, September, November and December, 1928.

Q. Do you have the slips for July, 1928?

A. Yes, sir.

Q. Of the entire purchase you made from the Atlantic Refining Company?

A. Yes, sir.

Q. Will you hold them in your hand? What, if anything, was due you from the Atlantic Refining Company as a discount from the charges?

20 A. July, \$63.95.

Q. And that comprises the purchase of how many gallons?

A. 12,791.

Q. Are there any further sums due you from the Atlantic Refining Company?

A. There is the month of August, they didn't pay us the additional half cent.

Q. Do you have the slips for the entire purchase from the complainant during the month of August?

30 A. Yes, sir, I have.

Q. What is the total number of gallons you purchased?

A. 12,101 gallons.

Q. What, if anything, is due you from the Atlantic Refining Company for purchases made in August, 1928?

A. \$60.50.

Q. Did you make purchases from this company in any other month?

A. September, October, November, December, January, February, March and April.

Q. What was the gallonage reached in September, 1928? ?

A. It was 10,272.

Q. Do you have the slips for the entire purchase of gasoline from the Atlantic Refining Company in 10 your hand?

A. Yes, for the month of September.

Q. What, if anything, is due from the Atlantic Refining Company for and on account of those purchases?

A. \$51.36.

Q. What was the gallonage purchased during the month of September—October, 1928?

A. 7234.

Q. Is there any moneys due you from the com- 20
plainant?

A. No, sir, they paid us the quota that month.

Q. What was the gallonage purchased from the complainant in November, 1928?

A. 5,468.

Q. Is there anything due from the complainant?

A. Yes, sir, that month they didn't give us any discount at all.

Q. How much is due you?

A. That two-cent discount. 30

Q. What does that total?

A. \$109.36.

Q. What was the number of gallons you purchased from the complainant in December, 1928?

A. 5839.

Q. Is there any money due you from the complainant?

A. \$116.78.

Q. For that month?

A. December.

Q. What does that total?

A. The total is \$452.14.

Q. That is due to you by the Atlantic?

A. Atlantic Refining Company.

10 Cross-examination.

By Mr. Richards:

Q. I show you three sales-slips of the Atlantic Refining Company, number 5002, 5044, 5016, and ask you if that is your signature?

A. Yes, sir.

Q. On each one of them?

A. That is. That is not.

20 Q. Referring to 5016 witness denies that is his signature and admits 5044 and 5002 are.

(Two slips offered in evidence, received and marked Exhibits C5 and C6.)

Mr. McGee: If the Court please, I want to offer in evidence the month of May, July, August, November and December of 1928.

30 Mr. Richards: No objection to the slips as slips. We object, of course, to their probative force. (Slips received in evidence and marked Exhibits D5, 6, 7, 8, 9 and 10, respectively.)

Mr. Richards: I want to move to strike all of the evidence relative to the alleged agreement to give this one-half per cent rebate on the ground that

there is no evidence to connect that as an agreement with the Atlantic Refining Company, the plaintiff here.

The Court: The testimony is that the same party who engineered the contract, the original contract, said that he would take it up with the company, and that he returned and reported to Mr. Kelly that that agreement was made. I think it will have to remain in evidence.

10

DEFENDANTS REST.

EDWIN R. COX, JR., recalled.

Direct examination.

By Mr. Richards:

20

Q. Mr. Cox, did you make an agreement with Mr. Kelly on behalf of the Atlantic Refining Company to allow an extra half cent per gallon on all gasoline sales over ten thousand gallons?

A. No, sir. We had no agreement to that effect.

Q. Did you take up with the company the proposition of making such an agreement?

A. No, sir.

Q. Did the company ever agree to that?

30

A. We never agreed to that.

Q. Did you reiterate what the conversation was regarding this one-half cent?

A. You see, we came down and went into a new territory and with a new customer we felt this competition would be —

Mr. McGee: I object to yes or no answer.

The Court: Yes.

Mr. Richards: Asked him to reiterate the conversation.

Q. Cut out the preliminaries, get down to the conversation, what you said to Kelly and what Kelly
10 said to you.

A. Told Mr. Kelly because of the fact he was a new customer in a new field he would possibly meet competition and we were anxious to help him, while our contract read tank wagon price, we graciously gave Mr. Kelly something additional to that, his contract price or below his contract price.

Q. What was that something that you gave him?

A. For a while we gave Mr. Kelly two cents below that price, for a while we gave him a half cent additional when he bought 10,000 or over, to give him an
20 incentive to work.

Q. That was a voluntary proposition?

A. We gave that to Mr. Kelly.

Q. There was no contract?

A. Only contract we have is the one —

Q. This is the original contract. Did you have an authority to make that contract?

A. To offer the terms to Mr. Kelly?

Q. To make the contract, to execute the contract?

30

The Court: Mr. Cox didn't execute it.

Q. Did you have authority to execute contracts such as that that was in evidence here?

A. No, I didn't sign the contract.

Q. When these contract forms were prepared, who did have authority to sign it?

A. Mr. H. B. Stone.

Q. By the way, did you endeavor to have Mr. Stone here today?

A. We did. He is in Syracuse.

Q. Syracuse, New York?

A. Yes, sir.

Q. Were you able to get him here?

A. No, sir, we were not.

Cross-examination.

10

By Mr. McGee:

Q. Now, Mr. Cox, you volunteered, you testified to give this discount of two cents and one-half cent to Mr. Kelly?

A. We offered Mr. Kelly an additional rebate, yes, sir.

Q. Who told you to offer that to him?

A. It was the intention of the company, and Mr. Stone gave me the authority to offer Mr. Kelly an additional rebate below our contract.

Q. Mr. Stone?

A. Yes, sir.

Q. Did you have a conversation with Mr. Kelly and tell him that you would take up with Mr. Stone as to whether or not this discount of two cents and one-half cent could be worked out?

A. No, we knew our competition when we came down here, and we thought we had to do that. I was armed with that authority when I first talked with Mr. Kelly.

Q. Mr. Cox, is that usual or unusual in your business?

A. It is usual, sir, regular practice of the industry. We do that right along.

Q. Mr. Kelly never said anything about this discount at all to you, you just came in and said here is two cents a gallon discount under tank wagon, here is a half a cent when you reach, extra, when you reach the ten thousand gallons in any one month?

A. At the time of signing, yes, sir, that is what I said.

Q. Did you have some conversation after the time of signing?

10 A. In regard to price?

Q. Yes.

A. No, sir, only when the competition forced us to change prices, when Mr. Kelly's gallonage began to run up and he didn't need his additional half cent.

Q. When are you referring to?

A. When his gallonage began to mount to something more under the tank wagon, half cent, and our competition forced us to cut down our cost of selling.

20 Q. Does that same reason apply as to taking away in the fall of the two-cent discount?

A. No, that was due to the competitive station, where the competitors changed their price on gasoline, and we were forced to comply with that competition.

Q. Even though it would hurt your own service man?

A. Undoubtedly it didn't hurt our service man.

30 Q. You say taking two cents a gallon off the owner of a service station doesn't injure him?

A. Did because at the same time the company stopped all their own discount, it sent more business to the dealer.

Q. Why do you say it wouldn't injure him?

A. Because sent more business to him.

Q. Wouldn't his profits be that much less?

A. No, we sent more gallonage to him.

Q. You sent more gallonage to him, what do you mean?

A. The whole system was changed so far as the rating of the service station.

Q. You mean you gave him more gallonage?

A. No, but our courtesy cards were cut out.

Q. How did that help him?

A. Because they had no advantage in buying from this company's service station, the dealer got the advantage, same as our own stations. 10

Q. You heard Mr. Kelly testify about this service station, the rebate didn't help him?

Mr. Richards: I object.

The Court: Yes, there is no question.

Q. You still insist you just voluntarily gave Kelly this discount and told him you just work along as long as this contract remains in force that we have any contract with you? 20

A. No, never said anything like that. We gave Mr. Kelly an additional rebate off his contract price, didn't say how long it would continue or how long it would stop.

Q. If you felt like it, the next day?

A. According to the contract, that was the arrangement.

Q. You did make a contract?

A. To sell at tank wagon prices, which we always did, or had to do. 30

Q. Did you make a parol contract?

A. Made no other contract.

Q. Did you ever talk to Mr. Kelly after the written contract was entered into?

A. When Mr. Kelly some time later began to

quibble about the half cent of rebate, we tried to explain to Mr. Kelly the market or conditions had changed in his territory, and we were attempting to meet competition.

Q. Mr. Cox, didn't you consider that the Kellys were value to you as a distribution, from a distribution point of view?

A. We certainly did. That is why we attempted to co-operate with them.

10 Q. Then when you testify now in all probability, having been in the business, that they were valuable to you, then you still say that they never discussed with you the two-cent margin under tank wagon or the half-cent discount?

A. I beg pardon, I didn't say that. Mr. Kelly, I said, talked about that when we started to take that away from him.

20 Q. Didn't he talk about it before you gave it to him?

A. Before we gave it to him?

Q. Yes.

A. No, sir, they signed the contract and I said to him, will get two cents below it.

Q. Mr. Kelly was doing a very good business before he took your product, wasn't he?

Mr. Richards: I object to that.

30 The Court: Sustain the objection.

A. That is for Mr. Kelly to answer. I don't know.

MISS ANNA HOWARD, SWORN.

Direct examination.

By Mr. Richards:

Q. Miss Howard, are you employed by the Atlantic Refining Company?

A. Yes, sir. 10

Q. Whereabouts?

A. Philadelphia.

Q. In what capacity?

A. Stenographer to Mr. Stone.

Q. I show you a letter dated July 12th, 1928, and ask you if you can tell who wrote that letter?

A. I did.

Q. Did you also write this letter, D1, July 30th?

A. Yes, sir.

Q. Now, that letter says, "We are attaching here- 20
to a copy of the agreement which you executed."

Who made that copy?

A. I did.

Q. From what did you make it?

A. From the original copy in our files.

Q. In this file?

A. Yes, sir.

Q. Is this the carbon copy?

A. Yes, sir.

Q. I show you paper, D2, and ask you if it is in 30
fact an exact copy from the paper from which you
copied?

A. No, sir.

Q. What is wrong with it?

A. The hundred per cent clause is not in it.

Q. What do you refer to?

A. This clause.

Q. The typewriting on the back of the first page?

A. Yes, sir.

Q. Which reads: "In consideration of the investment required, it is agreed that the above location shall be used only for the sale of Atlantic gasoline and Atlantic motor oils."

A. Yes, sir.

10 Q. Do you know how you came to fail to put that on there?

A. I overlooked it, I suppose, when I turned it over like this, on the back, and I missed the copy.

Q. Because of the fold in it beyond that point, is that it?

A. I imagine that is where it went.

Q. Was this clause on there at the time?

A. Yes, sir.

Cross-examination.

20

By Mr. McGee:

Q. Miss Howard, did you testify that you wrote a letter dated July 30th, 1928, marked D1?

A. Yes, sir.

Q. Whose signature is that, if you know?

A. Mr. Stone.

Q. That is Mr. Stone's signature?

A. Yes, sir.

30 Q. In this letter, in the first sentence, it says: "Your letter of July 27th, returning our letter of July 12th, we are attaching hereto a copy of the agreement which you executed and the agreement carries with it the entire terms." Then is this letter wrong?

A. Not to my knowledge, that is the way it was dictated, and that is what I wrote.

Q. Is this letter right and the agreement wrong, or is the agreement right and the letter wrong?

A. No, the letter is right. I made the copy and I overlooked putting that in when I copied it.

Q. Then this copy is an exact copy?

A. No, sir.

Q. Miss Howard, you say that this was copied from a carbon copy in your file?

A. That was copied from this, that is our filed copy. 10

Q. Did you know where the original was?

A. The original agreement?

Q. Yes.

A. No, I can't say that I did. If Mr. Stone told me to make a copy, I would go to the file and get this out and make a copy from this, our filed copy.

Q. Now, you say that you probably missed that because the flap or the second page was turned back in some way. Will you just illustrate how that happened, if you know? 20

A. I am just surmising, this is the way it had been, I copied this and I turned it over like this, and that is how I missed it.

Q. Who typed this contract?

A. This contract?

Q. Do you know?

A. I can't say for sure, but I suppose the man who usually types them.

Q. You don't know, do you?

A. I am positively certain the same boy who always does it, or did. 30

Q. But to your knowledge you don't know who typed this contract, do you?

A. Yes, I am pretty sure in saying he did, because no one else ever did.

Q. You didn't see him typing it, did you?

A. I can't say I saw him do it.

Q. As a matter of fact, you couldn't have made that mistake, could you, by turning back?

A. I couldn't have done it?

Q. No.

A. I think I could.

Q. In all probability, working from that agreement and that fastening, weren't you?

A. This agreement.

10 Q. In this one, referring to the Exhibit D2?

A. I would rather have to have my copy like this, turn over like this, and copy down this side.

Q. When did you realize that you had made a mistake?

A. I didn't know I had made a mistake until yesterday.

Q. You don't know whether this copy that you copied from was a copy of the original or not, do you?

20 A. Sure I know. It was in our files.

Q. It didn't necessarily follow, does it, just because it was in your files, it was a copy of the original contract?

A. Yes.

Q. Wouldn't it have been possible for somebody to have typed in an agreement and have it to be placed in your files?

A. It is possible, but not probable.

Q. Then you are not certain, are you?

30 A. Yes, I am certain, that is a copy of the original.

Q. What makes you think it?

A. Because I know that is where we keep our originals.

Mr. Richards: The original is in evidence, and let her take that and the original and see.

A. If you compare it with the original, it is exactly the same.

Q. Can you tell me from the original, can you tell me whether or not that is the copy from that original? (Referring to the carbon copy taken from the file as testified to by Miss Howard.)

A. You can tell it is an exact copy because this end is up and this end is up.

Q. Illustrate by some other parts of the contract other than the part referring to "In consideration," 10 and so forth? This is on the second page.

A. Here is a mistake here. (Indicating first page.) That "r" struck over there, and it is struck over just the same as this "m" over there.

Q. Do you know in whose custody this original contract has been?

A. No, sir.

Q. Referring to letter of July 30th, 1928, marked Exhibit D1, you wrote for Mr. Stone that the copy of the contract was in the original contract's entire 20 terms. Do you know whether or not this letter was correct and Mr. Stone considered this contract that you sent the correct copy?

Mr. Richards: I object to what Mr. Stone considered.

The Court: Sustain the objection.

Q. Who told you first that you had made a mis- 30 take?

A. One of the clerks in our office.

Q. When?

A. Yesterday when he told me I was to come down.

Q. Yesterday?

A. Yes.

Q. Was there anything said to you prior to that time?

A. No, sir.

Q. Nothing at all?

A. No.

10 THOMAS H. MCCOOL, sworn.

Direct examination.

By Mr. Richards:

Q. Mr. McCool, what is your business?

A. I am an examiner of questioned documents.

Q. How long have you been examining questioned documents?

A. Thirty-seven years.

20 Q. Have you been testifying in court concerning such examinations?

A. Yes, sir.

Q. How long?

A. Thirty-seven years.

Q. Have you made an examination of the methods of ascertaining whether or not one person has written two different documents?

A. Yes, sir.

30 Q. And I suppose conversely whether or not the same person has written parts of the same document?

A. Yes, sir.

Q. Or whether two different people will —

Mr. McGee: I will admit the qualifications of this gentleman.

Q. Did you examine a contract marked Exhibit C3?

A. I haven't seen Exhibit 3 on the paper, that I hold in my hand, but I examined this paper.

Q. Did you examine that paper with a view of ascertaining who wrote the initials "L. K." on that paper?

A. Yes, sir.

Q. Now, what did you have with which to make the comparison? 10

A. I had signatures to the same document at the end of the agreement, I also had some letters.

Q. What were the letters?

A. One letter dated July 10th, 1928, letter of May 26th, 1928, also some slips, bills.

Q. Are these the papers that you had?

A. Yes, sir, 5044, 5002, bills.

Q. Referring to Exhibits C5 and 6. Now, these letters were identified by Mr. Kelly the other day, but were not marked by me in evidence. I want to offer them now. 20

(Letter received and marked Exhibits C7 and C8.)

Q. Did you also use this letter?

A. Yes, sir.

Q. Referring to C4?

A. Yes, sir.

Q. Can you say whether or not the same person wrote the "L. K." on the first page of that document as signed the document? 30

A. I will give you my opinion. My opinion is that the same person wrote the "L. K." opposite the first paragraph of the agreement, the same person who wrote the signature on the bottom.

Q. "Louis and Jack Kelly, Lous Kelly?"

A. Yes, sir.

Q. Is that the same person who wrote these letters or signed these letters?

A. Yes, sir.

Q. Referring to Exhibits 4, 8 and 9. Did you make an examination to determine whether or not that initial was placed there at the same time as the signature?

10 A. I didn't quite understand your question.

Q. I wanted to know whether or not you examined it to find out whether it was placed there at the same time.

A. As to whether the "L. K." was placed where it is when the document was signed?

Q. Yes.

A. So far as I can ascertain, it was. It is written in the same manner, it is written with the same ink, apparently, and the pen was held in the hand in the same, at the same angle to the paper, when the "L. K." was written as when the document was signed. By that I mean, when I say angle as to the paper, I mean that a person holding the pen in writing "L. K." had the same side of the nib toward the paper as when the document was signed at the bottom. That is, the pen was held evenly on the paper. Every person who writes with a pen holds the pen in the same manner when he writes. He doesn't write sometimes with the left nib facing the paper, or toward the paper, and another time with the right nib toward the paper. As a rule, persons write with the pen in the same position. For instance, if I take the pen in my hand and commence to write, if the pen isn't in the usual position, I turn it until it is, and I find that, I have watched hundreds of people, take the pen in the hand and turn

20

30

it as I have described, until the ball of the pen appears in the same manner to the eye, and I find that in these two writings, the writer held the pen in the same position, and if another person had written there, he would probably have held his pen in his natural way, and not quite the same, perhaps, as the other person had written it, but these are both written with the pen held in the same position, showing the clear characteristic of the writer.

Q. What other characteristics can you show us about them, Mr. McCool? 10

A. I will refer to my notes. The line quality in the disputed initials is the same as in the signature at the bottom of the paper, and also the signature and the letters, the writing in the letter, the line quality is the same. Same writer, and it is their habit or characteristic of any other to make a line of a certain quality, sometimes from nervousness or spasmodic quality in the person, and perhaps a lump of ink will appear, perhaps, at regular or almost regular distance to the line of break, sometimes. Now, I find the line quality of these initials the same as in the signature at the bottom. That is another quality which no one can control. The other matter that I spoke of, holding the pen in the same manner, that is not quite so fixed in a person's body or hand, that may be altered if it is done purposely, but when people write naturally they don't do that because they are not thinking of that. In fact, no one does think of that who is going to do ordinary writing or regular writing. They give no thought of that because they have never considered it, and never known that there is such a thing to be discovered, but the microscope reveals that regularly and without fail. In the formation of the letters there is great similarity be- 20 30

tween the admitted writing of this person. I find variations among the signatures and other writing that is admitted. The signatures are admitted and I find variations there, so it is not to be considered that the person who will write on one paper or in one place and go to another place on the paper and write and have the characters exactly the same, in fact, if the character were exactly the same I would say one of them was a forgery, but I find variations here, however, between the disputed and the one admitted with another admitted, so there are some slight differences in the disputed letters. I find that the loop at the base of the L, for instance, that seems to be about the same, and it is made in the same direction horizontally, nearly horizontally, I should say it is almost horizontal, and it is not exactly horizontal in any that I have examined, but they do seem to be practically the same. That is this loop at the base of the letter L, but where we would say for the base line, sometimes it is only an imaginary base line, but it is the bottom of a letter. The finish of that letter is variable, and in the disputed L it is not so long as in some of the admitting writings. It is generally shorter, but it varies in length. The top of the L is made variable, also the writer in the admitted papers and one included in that is the signature to the agreement, we find that the person who wrote "Louis and Jack Kelly, Louis Kelly," made that particular portion of the L variable, one of them has been made beginning at the middle of that line, and on the down stroke of the L, then the letter was patched, and the upper portion was added, but added with the same kind of ink and apparently at the same time, only just after and before the letter was dry, the upper portion was added. The other L in the same

connection is not broken at all, and it has the compound curve on the down stroke. Now the K is also variable. The K, generally, this writer makes the K with curved lines, the first line of the K appears at the bottom of the agreement has a curve, while in the disputed, it is curved, but very slightly, and I find that this writer does make those lines just about as it is in that disputed paper, at the bottom of the letter dated July 10th, C7, the first line there is about as straight as it is in the disputed letter. The last line also of the same letter is, as far as it goes, is similar to the disputed K. On the bill 5044 we see there, I hadn't called attention to this letter in the bill, I do now, for the L as showing very large curve, the one in the disputed letters is larger at the top than the one in the signature at the base, but it isn't so much as the one on this bill, so that the disputed letter is not out of the line of Ls made by this writer. It is larger, it has more of a curve at the top than the signature at the base, and not so much as the signature to this bill, showing that it is within a radius of his characteristics in making that letter.

The last line, or first line of the K on the bill where it says, "Kelly Service Station," the first line is straight, fully as straight as the one on the disputed and the last line of the letter is also straight, so that this writer does make those lines straight, not curved always as in the signature to the agreement.

On the bill 5002, dated February 21, I am not sure whether 21st or 22nd, 1928, where that line is almost as long as in the disputed, the one in the disputed lines is longer than the signature at the bottom of the agreement.

Another similarity is that in the K in the disputed

letter "L. K." and in the signature at the bottom, the two parts of the K do not connect, do not touch, and that seems to be a characteristic of the writer, the two parts of the K are not joined together. I think from the large number of similarities, including especially the one of holding the pen in the hand, and the line quality, including this especially, I say I think that the same person must have written the disputed letters.

10 Q. Can you say whether or not they were written about the same time?

A. I think so, they are in the same kind of ink and not only the same kind of ink, but the same, apparently the same mixture of ink, one is not thicker than the other, both very faint light ink, and everything apparently one as the other, and I think that they were written about that time.

20 Q. Would you say it would be possible that they could be written as much as two or three weeks apart?

A. I think not.

Q. Now, did you ——

A. I, of course, did not, and would not attempt to make a chemical examination of these letters without authority, but so far as I can observe, under a microscopic examination, I think that they were written at the same time or within a day or two, I couldn't say any nearer than that.

30 Q. Now, then, Mr. McCool, did you examine this same document with regard to some of the typewriting?

A. Yes, sir.

Q. Now, does typewriting exhibit certain characteristics whereby it is possible to determine whether a document was written on the same typewriter or about the same time?

A. Well, there isn't very much opportunity for examining the typewriting that would be written at the same time. It is possible to discover whether the typewriting was done on the same machine or the same kind of machine, sometimes there is evidence that the writing was done at the same time. I notice in regard to this typewriting that the type is the same in the disputed paragraph as in the other entries —

Q. May I interrupt there just a minute, on the 10
clause on the second page which begins, "In consideration of the investment required," and so forth, is the phrase disputed?

A. Yes, sir.

Q. There is a contention on the part of the defendant that that clause was not on there, was not written on there at the same time as this document. Now, with that in mind, will you tell the Court whether in your mind that was written there at the 20
same time?

A. I can only tell what I found in the examination of the document, that in the first place, the type—do you want me to refer to the type or just confine myself to the other question which was in regard to whether it was done at the same time?

Q. The same time, same machine, and so forth, make it fairly brief as you can.

A. I noticed first in comparing the disputed clause with the other typewriting on the same paper, that the first word in the disputed clause is "In;" further down I see in the sentence "Installing cinder driveway," the first part of "Installing" is "In," just the same as in the word "In," in the disputed clause, I find that that capital I is out of alignment, either the I or n is out of alignment, and that the I stands out much higher than the n, and the same 30

distance above the n as in the word "Installing." That is an evidence that both machines, if there were two, must have that same letter out of alignment, the capital I, which is probably improbable but not impossible. I find by measurement that the disputed clause is placed exactly the same distance from the edge of the paper in the disputed clause as in the admitted clause, "Installing the cinder driveway." I find also by actual measurement that

10) the disputed clause is on the paper exactly parallel with the clause "Installing cinder driveway." That would indicate to me that the paper was in the machine at such a point that when the carriage was brought back from writing a line, the carriage was brought back, it generally is brought back to where it hits, and that in both of these paragraphs or clauses it hit at exactly the same place, so that the paper must have been put in, must have been in the machine exactly in the same position as to the

20) margin of the paper and as to the direction of the type in writing, showing that they were both exactly parallel, which doesn't often happen, could hardly happen in both those matters, but they are facts that cannot be controverted, that they were put—that the paper was in the machine exactly in the same position and in the same direction.

I took measurements, but the edge of the letter I in both those paragraphs stood only one and $\frac{3}{32}$ nds of an inch from the end of the paper. The

30) distance from the type and the print on the paper $1\text{-}13\frac{13}{32}$ nd, the same in both places of measurement. From those similarities in the two writings, I do not find anything upon which to base an opinion that the disputed was not written at the same time as the rest of the agreement, and without removing the paper from the machine, that they were, in my

opinion, both written without taking the paper out of the machine.

Q. And, therefore, must have been written at the same time?

A. Yes, sir.

Cross-examination.

By Mr. McGee:

Q. Isn't it possible for that paper to be placed in the machine after it was first written and the margin to be worked out with the margin as originally was placed in with any other writing that might be put in at a later time?

A. It is possible, but it is not probable.

Q. You can't tell as to the time when this was, from the printing of the type itself, as to when this paper, whether or not this paper was in the machine 20 at the same time, can you?

A. I am not quite sure about your question.

Q. Can you tell by looking at the type—referring to the clause in dispute in the contract, and the typing in the balance of the contract—can you tell if these were typed at the same time?

A. Not in that way, no, sir, not by looking at the type itself, not by the record of the type.

Q. By those measurements that you referred to, have you ever made a mistake? 30

A. Not when I look at the seven, I know it is a seven.

Q. I mean as to whether or not this paragraph in dispute was typed at the same time the rest of the instrument was?

A. Well, I just form an opinion through what I

have described, and I don't see any chance of being mistaken about that.

Q. Well, this may have been typewritten after the balance of the instrument was typewritten by placing it in the same machine, couldn't it, and it would show the defect in the typing of the letter, if there was a defect in that machine, or any particular letter?

A. I should think so.

10 Q. Then it is not improbable, is it, that this was not inserted, this paragraph in dispute, at a later time?

A. It is improbable, yes, sir. It is not impossible, but it will require, in my opinion, that the person who was doing that inserting, that paper in there, would be miraculous about his work than people generally are if they are going to add something to a document, they will insert the paper at about the same position, but the accuracy of a sixty-fourth
20 of an inch, I doubt whether that they would.

Q. The machine itself would measure with its margin that accurate, would it not?

A. Not unless it is placed in the machine by a person who was writing, they had to do that, and if they had placed the paper in the machine I don't think they would be so particular as to get to a sixty-fourth of an inch by actual measurement, just put it in and get it about the same place.

30 Q. If you insert the paper to the top of a machine and roll it around, and you line it up with a certain margin on there by the side on the machine, isn't it possible to roll that back to any part of the paper and still it would conform to your reasoning?

A. Well, this must have been taken out of the machine and put back some other time.

Q. That is what I say, be taken out and put back?

A. No, I have explained my reason for thinking that it would not have been.

Q. Mr. McCool, as to these initials on the contract, Exhibit C3, you testify that you don't know whether it would be possible, or whether the initials were made at a different time, say, for a period of two or three weeks prior to the time that the signature was signed?

A. Oh, I didn't say that. I said it was a difference of a day I couldn't tell, but a difference of two or three weeks I think the ink would change in its color so as to be noticeable, and this isn't changed, both inks appear to be the same condition. 10

Q. In fact, Mr. McCool, a period would do much?

A. A change in two or three weeks, I didn't notice what time of the year this was, but it depends, it changes more at one time of the year than another.

Q. What time of the year does it change more than the other? 20

A. It changes more in the summer-time or spring-time than it does in the cold winter-time.

Q. In this case it was supposed to be executed in February, then it wouldn't change so quickly at that time of the year, would it?

A. It wouldn't change so quickly as it would in the summer-time.

Q. You testified that there are a number of variations in the signatures of L. V. or Louis V. Kelly; that is correct, is it not? 30

A. Yes, sir.

Q. Is it impossible for anybody to copy that signature?

A. I think not possible to, you see, to change that signature or write the same.

Q. To write it, yes.

A. I don't think it is possible to write the whole name.

Q. How about "L. K.?"

A. Well, "L. K."

Q. Would be rather simple, wouldn't it?

A. There is not much feature, and they could get very good imitation of it, but when compared, and when the penholding is compared, there are differences that appear that enable one who was experienced at making examinations of handwriting, whether it is the same writing or not. If it was exactly the same, as I said, I would say that it was a forgery, but they are not exactly alike, and, therefore, I think that is one chance of their being genuine. There is no evidence of labor about the letters.

Q. Of what?

A. There is no evidence of labor as though a person was drawing the lines, they are made just about the same rate of speed as the signature at the bottom.

Q. It is possible, however, that the initials could be forged and forged accurately enough for you to not know it, wouldn't it be?

A. I don't think so. I don't think they could do it so accurately, as you suggest, without showing labor, showing that they were making the effort to do that, and it makes a hesitating job of it.

Q. But yet it is possible, is it not?

A. I don't think it is possible without showing labor in the lines.

Q. What?

A. I don't think it is possible without showing labor in the lines under microscopic observation. It might deceive the eye but wouldn't deceive the microscope.

Q. Do you have varying degrees of labor?

A. Oh, yes.

Q. Well, is there any labor indicated in this?

A. No.

Q. None at all?

A. I don't think there is any.

Q. Well, do you know?

A. I know, yes.

Q. Why do you say that?

A. Because I had it under a good powerful micro-¹⁰
scope.

Q. When did you have it under a microscope?

A. Today.

Q. Today?

A. Yes, sir.

Q. How long ago?

A. Something over five hours ago, between four
and five hours ago.

Q. You do recall that you tested for labor?

A. Oh, yes.

20

COMPLAINANT RESTS.

TESTIMONY CLOSED.

30

10

COMPLAINANT'S EXHIBITS.

20

30

233

C.I.
9/18/29 R.



Sept. 16, 1929
Atlantic Fire Service

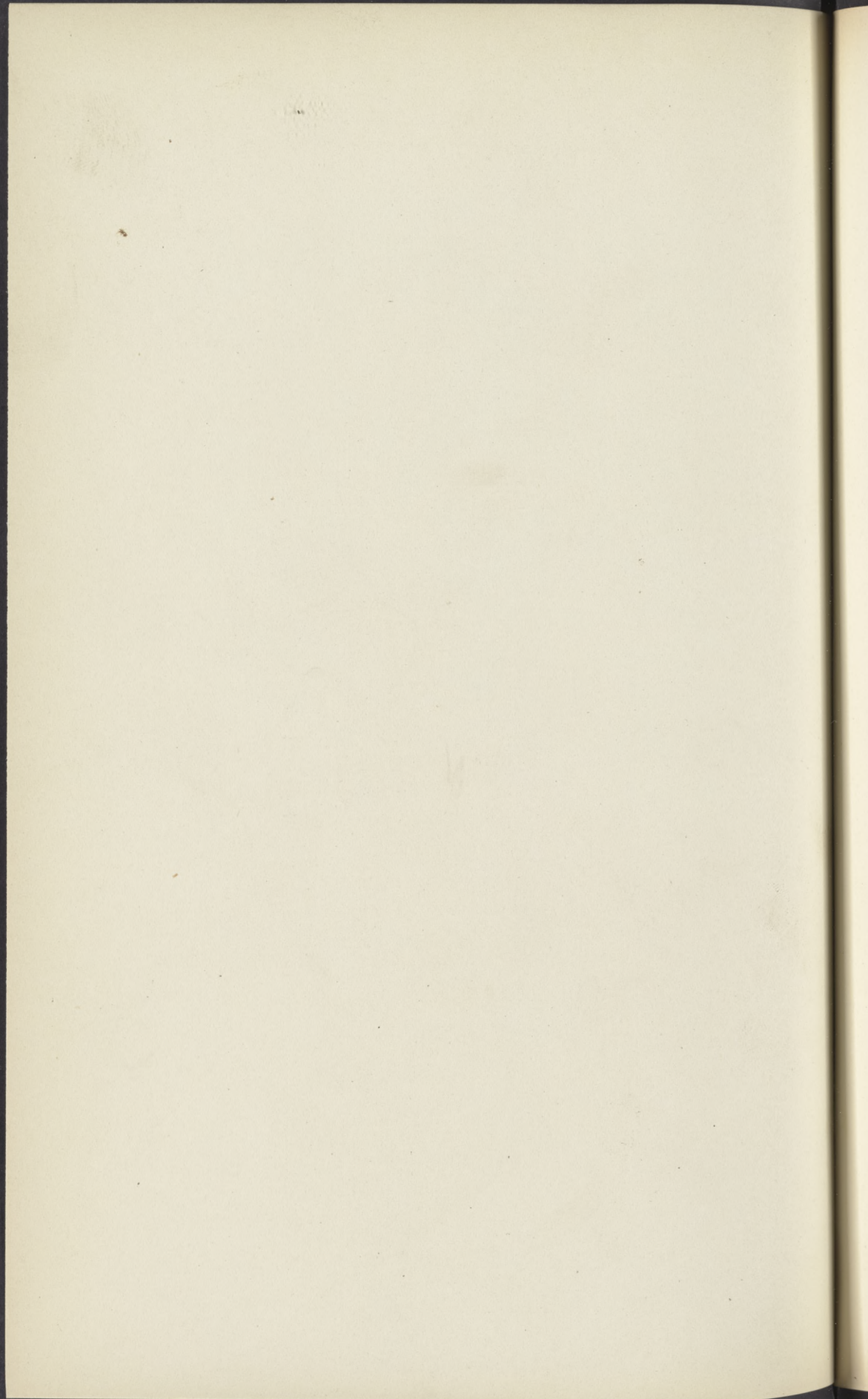


EXHIBIT C3.

9/18/29L.

Group #2

(Seal: The Atlantic Refining Company)

In margin:

E. R. Cox

L K

H. B. S.

10

THIS AGREEMENT made the 2nd. day of February 1928, between THE ATLANTIC REFINING COMPANY, a corporation of the Commonwealth

Louis

of Pennsylvania, party of the first part, and Paul & Jack Kelly of Margate, County of Atlantic, State of New Jersey, party of the second part;

WHEREAS the party of the second part is the Lessee of a certain piece of land situated at Ventnor & Delavan Streets in the City of Margate, County of Atlantic, State of New Jersey, by a lease with

20

..... dated the day of, 19...., and recorded in the office for recording of deeds in and for in book, page and etc., more definitely described as follows:

and is desirous of having the party of the first part enter upon said land for the purpose of making certain improvements as well as installing thereon a system for retailing gasoline, motor fuels, motor oils and greases to the general public and loan same to the party of the second part;

30

NOW THEREFORE THIS AGREEMENT WITNESSETH:

21 —

That the party of the first part, in consideration

of the party of the second part purchasign all gasoline, motor fuels, motor oils and greases handled and dispensed from said piece of land first above described, solely from the party of the first part, at the party of the first part's following specified prices, prevailing in the town or city in which said land is located;

- All gasoline and motor fuels at tank wagon price to dealers,
- 10 All motor oils and greases as per schedule of prices to dealers;
- hereby agrees to furnish and lend, to the party of the second part, for a period beginning on the day first above mentioned and continuing until the Second day of February, 1933, a complete system for retailing gasoline, motor fuels, motor oils and greases to the general public, the said system, for the purpose of this agreement, to include the following:
- 20 Four (4) 5-Gal. pumps. Four (4) 20 bbl. 12 Gauge
Four (4) T-71 Meters tanks.
Four (4) T-166 Foot Four (4) Man-Holt Fill
Valves Caps.
Four (4) Fitter Globes Four (4) Gauge Rods &
Four (4) Hoses & Nozzles Tables
One (1) Internally Il- Four (4) Motor Oil Out-
minated Sign. fits.

- Two (2) Lamp Standards
- Also the necessary underground piping for the
- 30 above system excavating refill and cement work.
- In consideration of the investment required, it is agreed that the above location shall be used only for the sale of Atlantic Gasoline and Atlantic Motor Oils.

The party of the first part further agrees to install said system and make the following improvements at its own cost and expense:

Installing Cinder Driveway

Nothing herein contained shall be construed as preventing the party of the second part from selling or otherwise dealing in automobile accessories and supplies, except petroleum products, which said automobile accessories, except as aforesaid, may be purchased from any person or corporation.

It is agreed that the system shall at all times remain the property of the party of the first part; and that by reason of the investment made by the party of the first part in the installation of the system and the making of the improvements, it shall be operated and used along with the said piece of land first above described, by the party of the second part, during the continuance of this agreement or any extension thereof, only for the purpose of handling and dispensing gasoline, motor fuels, motor oils and greases purchased from the party of the first part; and that, at the expiration of this Agreement or any extension or prior termination thereof, said system shall be turned over to the party of the first part in good order and condition.

It is further agreed that if the party of the second part shall at any time cease to purchase all gasoline, motor fuels, motor oils and greases handled and dispensed through the said system from the party of the first part; or fail to pay promptly, on demand by the party of the first part, for all gasoline, motor fuels, motor oils and greases purchased in accordance with the terms of payment as specified from time to time in writing by the party of the first part; or attempt to or actually handle or dispense from said piece of land first above described, any gasoline, motor fuels, motor oils or greases purchased from any party other than the party of the first part; or fail to operate said system daily in a regular and businesslike manner; or fail

to purchase at least 100,000 gallons of gasoline or motor fuels and 2,000 gallons of motor oils yearly from said party of the first part; or use the said system for the handling of gasoline, motor fuels, motor oils and greases purchased from any other party; or for any purpose other than the handling of gasoline, motor fuels, motor oils and greases purchased from the party of the first part; or cease to purchase gasoline, motor fuels, motor oils and greases from the party of the first part; or attempt
10 to add to, move or remove the said system without the written permission of the party of the first part; or if any attachment, execution, distress for rent, or like process shall be issued against the party of the second part; or in the event of the party of the second part becoming financially embarrassed or involved, insolvent, or involved in bankruptcy, or in any other way the said party of the second part shall fail to keep or perform the terms and
20 conditions of this Agreement; then, and in such case, the said party of the second part shall be construed and is hereby declared to be in default hereunder, and the party of the first part may, immediately or thereafter, at its option, without notice to the party of the second part, take immediate possession of the said system and remove the same without let or hindrance, with or without process of law, without the party of the first part or its agent or agents, or the officers of the law, becoming
30 in any way liable for trespass, claims for injury or damage in the removal of the said system, and charge the party of the second part with the sum of Nineteen Hundred, Twenty Dollars (\$1,920.00), which, it is agreed, is the fair and reasonable cost of the installation and removal of the system and the cost of the improvements mentioned hereunder, and thereupon said sum charged shall immediately

become due and payable by the party of the second part; or allow said system to remain and charge the party of the second part with the sum of Twenty Eight Hundred, Twenty Dollars (\$2,820.00), the agreed value of the system and improvements, and thereupon said sum charged shall immediately become due and payable by the party of the second part, and upon the payment of said sum title to said system is to pass from the party of the first part to the party of the second part. 10

The party of the second part hereby waives and relinquishes any and all claims against the party of the first part, and does hereby exonerate, discharge and agree to protect and save harmless and indemnified said party of the first part, and its assignees from any and all liability for damage which may be suffered by the party of the second part, their agents, servants, or by any other person or persons on or about said premises, by reason of leakage, fire, explosion, or other casualty occurring through any imperfection in, injury or damage to, or by reason of the operation of the said system or premises, or from any cause whatsoever. 20

The party of the second part covenants and agrees that, at the time of the signing of this agreement, the property or premises are free of all liens and encumbrances, and that after the execution of this agreement he shall not encumber the property or permit the property to become encumbered in any way, without the written consent of the party of the first part. 30

The party of the second part hereby agrees to make application for and secure necessary permits from the respective City and State authorities for the making of said improvements and the installing of said equipment, and for the storing, handling and dispensing of petroleum products on and from

said piece of land first above described. Should any of said permits be refused or unduly delayed by the City and/or State authorities, then the party of the first part may at its election forthwith cancel this agreement.

10 The party of the second part shall pay for all water, gas and electricity used on the premises, keep the premises and the improvements on the premises in a clean and neat condition and not misuse or permit to be misused any of the mechanical equip-
ment placed upon the premises by the party of the first part.

20 This agreement shall continue in full force and effect for a further period of one year . . . from the end of the period hereinbefore stipulated, unless either party shall give written notice to the contrary, to the other party, sixty days prior to the termination of said first mentioned period; and after termination of said second period this agreement shall continue until termination by either party, by the giving of ninety days' written notice of such termination.

This agreement is not assignable without the written consent of the party of the first part.

30 All rights, remedies and liabilities herein given to, or imposed upon either of the parties hereto, shall extend to the respective heirs, executors, administrators, successors, and assigns of such party. IN WITNESS WHEREOF the parties have hereunto set their hands the day and year first above written.

THE ATLANTIC REFINING COMPANY,

By: Harold B. Stone
District Manager.

X Louis & Jack Kelly.
Louis Kelly

WITNESSES:

Ernest L McKenna
E. R. Cox Jr.

STATE OF NEW JERSEY }
COUNTY OF ATLANTIC } ss.
Cape May

10

BE IT REMEMBERED, That on this second day of May in the year of Our Lord One Thousand nine hundred and twenty-eight, before me, Scott H. Adams, Notary Public personally appeared LOUIS KELLY and JACK KELLY, the Party of the Second Part in the foregoing instrument, who, I am satisfied are the parties mentioned in the above agreement, and I having first made known to them the contents thereof, they and each of them acknowledged that they signed, sealed and delivered the same as their and each of their voluntary acts and deeds, all of which is hereby certified.

20

(Seal) Scott H Adams

MY COMMISSION EXPIRES APRIL 16, 1931.

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } ss.

30

BE IT REMEMBERED, That on this 2nd day of April in the year of Our Lord one thousand nine hundred and twenty-eight, before me, the subscriber, a Foreign Commissioner of Deeds for New Jersey, personally appeared HAROLD B. STONE, Manager of the New Jersey district of the above mentioned THE ATLANTIC REFINING COM-

PANY, who, I am satisfied, signed the above agreement for the Party of the First Part, and I having first made known to him the contents thereof, he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed and the voluntary act and deed of the said THE ATLANTIC REFINING COMPANY, all of which is hereby certified.

10 (Seal) Daniel C. Thompson
A Foreign Commissioner of
Deeds for New Jersey in
Pennsylvania
Commission Expires March 15, 1931

OWNER'S RELEASE

20 The undersigned, owner of the land mentioned under this agreement, at and upon which the herein mentioned system is to be installed and improvements are to be made, hereby acknowledges to have received notice of the within Agreement, and assents to the terms and conditions thereof, and in consideration of the sum of One Dollar (\$1.00), well and truly paid by THE ATLANTIC REFINING COMPANY, the receipt of which sum is hereby acknowledged, and the furnishing, installing, and lending
30 of the said system by the said Company to the party of the second part, and the making of said improvements, hereby waives and releases all right to hold or levy upon said system, or any and all parts thereof, belonging to said THE ATLANTIC REFINING COMPANY, for rent or otherwise, and hereby consents that the said system or any and all parts thereof, may be removed from said land

by THE ATLANTIC REFINING COMPANY, its successors or assigns, or their representatives at any time without notice or liability for any consequential or other damages to the undersigned other than to replace any physical property on said premises actually damaged in the removal of said system.

10

The undersigned further agrees that upon default of the party of the second part under the terms of the lease hereinbefore referred to, the undersigned will give to The Atlantic Refining Company forthwith written notice of said default, and if, by reason of said default, the undersigned has the right to terminate said lease and repossess himself of said leased land, that he will not terminate said lease or repossess himself of said leased land until fifteen days have elapsed from time of delivery to said The Atlantic Refining Company of such said written notice.

20

X John Dear
Owner.

Witness:
E. R. Cox Jr.

....., 192 .
State of }
County of } ss. 30

Then and there personally appeared
..... signer of the
foregoing instrument and acknowledged the same
to be free act and deed, before
me.

RECORDED in the Office for Recording of Deeds

in and for in
Deed Book No.
page &c.

WITNESS my hand and seal of Office this
..... day of A. D. 192....

10

AGREEMENT

THE ATLANTIC REFINING CO.

.....
(Address)

AND

.....
(Name)

20

.....
(Address in full)

.....
(Installation)

.....
(Location)

30

EXHIBIT C4.

9/18/29L

(Stamped: Received FEB 18 1928 H. B. Stone)
Neptune 1424J
Phone Marine 6127-W Official (AAA) Station
SUPERIOR OILING SERVICE
Delavan & Ventnor Aves.
114 No. So. Carolina Avenue
Atlantic City, N. J.

10

February 17, 1928

Atlantic Refining Co.
Philadelphia, Pa.

Attention Mr. H. Stone.

Gentlemen:

The progress of work on our station is not satisfactory.

To date you have your tanks placed and no other work has been started. 20

We were informed by Mr. E. Cox before signing the agreement that everything would be in readiness by February 21st 1928 and under this condition did we sign.

The agreement was signed February 2nd 1928.

We have our work completed and we cannot afford to lose a day.

Agreement calls for approaches, which should be in. 30

Agreement further calls for cinder driveway, and we were to let this contract out. We gave Mr. Cox a figure over two weeks ago.

We asked Mr. Blank, your foreman, about the approaches and he states that he does not know anything about them. Hence we are writing this letter for our common good as we are binding ourselves

to Atlantic products and we want co-operation from the Company.

We do not want something for nothing but we do want and insist on getting what was promised. If we were misled by your representative that station would be fitted out by the 21st and the Company does not know of it then it is time someone from your Company was here to straighten matters.

10 If it is impossible to fulfill agreement then cease operation on our station at once.

We are

Very sincerely yours

Kelly Bros.

L. V. K.

20

EXHIBIT C5.

9/18/29L

3501 PLEASANTVILLE

THE ATLANTIC REFINING CO.

H Mullen Jr.

No. 5044

30 (Seal: The Atlantic Refining Company)

Station

New Jersey

3/9/ 1928

Sold to Kelly Ser Sta

P. O. Address Delavan Ventnor Aves

Nearest Local Town Atlantic City

Order No.	Gallons	Price	Price Plus Gasoline Tax	Amount
Atl. Rayolight Oil				
Atl.			2c Per Gallon	
Atl. Ethyl Gasoline				
Atl. Gasoline	551	16	18	99 18
(Equip No. 122-301)				Total

10

Received Payment for The Atlantic Refining Co.
 Per
 Received the Above
 Firm Name Kellys Service Station
 Per Louis Kelly
 For Your Protection

Preserve this ticket for collection by our salesman. Do not accept altered tickets. To avoid mistakes see that you receive the quantity you sign for.

20

EXHIBIT C6.
 9/18/29L

3501 PLEASANTVILLE
 THE ATLANTIC REFINING CO.
 H Mullen Jr.

No. 5002 30

(Seal: The Atlantic Refining Company)
 Station
 New Jersey

2/21 1928

Sold to Lewis Jack Kelly
 P. O. Address Delavan Ventnor Aves
 Nearest Local Town Atlantic City

Order No.	Gallons	Price	Price Plus	Amount
Atl. Rayolight Oil			Gasoline	
Atl.			Tax	
Atl.			2c	
Atl. Ethyl Gasoline			Per	
Atl. Gasoline	741	16	18	133 38
(Equipt No. 122-301)			Total	

Received Payment for The Atlantic Refining Co.

Per

Received the Above

Firm Name Louis & Jack Kelly

Per Louis Kelly

For Your Protection

20 Preserve this ticket for collection by our salesman. Do not accept altered tickets. To avoid mistakes see that you receive the quantity you sign for.

EXHIBITS OF DEFENDANTS.

EXHIBIT D1.

9/18/29L

THE ATLANTIC REFINING COMPANY
PETROLEUM PRODUCTS

260 South Broad Street
Philadelphia, Pa.

July 30th, 1928. 10

Richard D. Leonard
General Manager of Domestic Sales
In Reply Refer to File

PS:HBS

Messrs. L. V. & J. A. Kelly,
Kelly's Service Station,
7709 Ventnor Avenue,
Margate City, New Jersey.

Dear Sirs:—

Your letter of July 27th returning our letter of July 12th, we are attaching hereto a copy of the agreement which you executed, and the agreement carries with it the entire terms. You will note in going over this agreement that no option is granted for the purchase of the equipment, and as stated in our letter of July 12th. We therefore would not be in a position to sell you the equipment. 20

The writer is asking Mr. E. R. Cox, Jr. to get in touch with you in the meantime, and the writer also expects to be in Atlantic City on Friday next, August 3rd, at which time I will be very glad to discuss the matter with you. 30

Yours very truly,

THE ATLANTIC REFINING COMPANY

Harold B. Stone

Manager of Sales

Philadelphia District

AGH

Quotations Subject to Change Without Notice

EXHIBIT D2.

9/18/29L

(Seal: The Atlantic Refining Company)
copy copy

Group #2

10 THIS AGREEMENT made the 2nd day of February 1928, between THE ATLANTIC REFINING COMPANY, a corporation of the Commonwealth of Pennsylvania, party of the first part, and Paul & Jack Kelly of Margate, County of Atlantic, State of New Jersey, party of the Second part;

WHEREAS the party of the second part is the Lessee of a certain piece of land situated at Ventnor & Delavan Streets in the City of Margate, County of Atlantic, State of New Jersey, by a lease with

20 dated the day of, 19...., and recorded in the office for recording of deeds in and for in book, page and etc., more definitely described as follows:

and is desirous of having the party of the first part enter upon said land for the purpose of making certain improvements as well as installing thereon a system for retailing gasoline, motor fuels, motor oils and greases to the general public and loan same

30 to the party of the second part;

NOW THEREFORE THIS AGREEMENT
WITNESSETH:

That the party of the first part, in consideration of the party of the second part purchasing all gasoline, motor fuels, motor oils and greases handled and dispensed from said piece of land first above

described, solely from the party of the first part, at the party of the first part's following specified prices, prevailing in the town or city in which said land is located;

All gasoline and motor fuels at tank wagon price to dealers,

All motor oils and greases as per schedule of prices to dealers;

hereby agrees to furnish and lend, to the party of the second part, for a period beginning on the day 10 first above mentioned and continuing until the second day of February, 1933, a complete system for retailing gasoline, motor fuels, motor oils and greases to the general public, the said system, for the purpose of this agreement, to include the following:

- | | | |
|-------------------------------------|------------------------------|----|
| Four (4) 5-Gal. pumps | Four (4) 20 bbl. 12 Gauge | |
| Four (4) T-71 Meters | tanks | |
| Four (4) T-166 Foot Valves | Four (4) Man-Holt Fill Caps | 20 |
| Four (4) Fitter Globes | Four (4) Gauge Rods & Tables | |
| Four (4) Hoses & Nozzles | | |
| One (1) Internally Illuminated Sign | Four (4) Motor Oil Outfits | |
| | Two (2) Lamp Standards | |

Also the necessary underground piping for the above system excavating refill and cement work.

The party of the first part further agrees to install said system and make the following improvements at its own cost and expense:

Installing cinder driveway

Nothing herein contained shall be construed as preventing the party of the second part from selling or otherwise dealing in automobile accessories and supplies, except petroleum products, which said automobile accessories, except as aforesaid, may be purchased from any person or corporation.

It is agreed that the system shall at all times remain the property of the party of the first part; and that by reason of the investment made by the party of the first part in the installation of the system and the making of the improvements, it shall be operated and used along with the said piece of land first above described, by the party of the second part, during the continuance of this agreement or any extension thereof, only for the purpose of handling and dispensing gasoline, motor fuels, motor oils and greases purchased for the party of the first part; and that, at the expiration of this Agreement or any extension or prior termination thereof, said system shall be turned over to the party of the first part in good order and condition.

It is further agreed that if the party of the second part shall at any time cease to purchase all gasoline, motor fuels, motor oils and greases handled and dispensed through the said system from the party of the first part; or fail to pay promptly, on demand by the party of the first part, for all gasoline, motor fuels, motor oils and greases purchased in accordance with the terms of payment as specified from time to time in writing by the party of the first part; or attempt to or actually handle or dispense from said piece of land first above described, any gasoline, motor fuels, motor oils or greases purchased from any party other than the party of the first part; or fail to operate said system daily in a regular and businesslike manner; or fail to purchase at least 100,000 gallons of gasoline or motor fuels and 2,000 gallons of motor oils yearly from said party of the first part; or use the said system for the handling of gasoline, motor fuels, motor oils and greases purchased from any other party; or for any purpose other than the handling of gasoline, motor fuels, motor oils and greases pur-

chased from the party of the first part; or cease to purchase gasoline, motor fuels, motor oils and greases from the party of the first part; or attempt to add to, move or remove the said system without the written permission of the party of the first part; or if any attachment, execution, distress for rent, or like process shall be issued against the party of the second part; or in the event of the party of the second part becoming financially embarrassed or involved, insolvent, or involved in bankruptcy, 10 or in any other way the said party of the second part shall fail to keep or perform the terms and conditions of this Agreement; then, and in such case, the said party of the second part shall be construed and is hereby declared to be in default hereunder, and the party of the first part may, immediately or thereafter, at its option, without notice to the party of the second part, take immediate possession of the said system and remove the same without let or hindrance, with or without process 20 of law, without the party of the first part or its agent or agents, or the officers of the law, becoming in any way liable for trespass, claims for injury or damage in the removal of the said system, and charge the party of the second part with the sum of Nineteen Hundred, Twenty Dollars (\$1,920.00), which, it is agreed, is the fair and reasonable cost of the installation and removal of the system and the cost of the improvements mentioned hereunder, and thereupon said sum charged shall immediately 30 become due and payable by the party of the second part; or allow said system to remain and charge the party of the second part with the sum of Twenty eight hundred twenty Dollars (\$2,820.00), the agreed value of the system and improvements, and thereupon said sum charged shall immediately become due and payable by the party of the second part,

and upon the payment of said sum title to said system is to pass from the party of the first part to the party of the second part.

10 The party of the second part hereby waives and relinquishes any and all claims against the party of the first part, and does hereby exonerate, discharge and agree to protect and save harmless and indemnified said party of the first part, and its assignees from any and all liability for damage which may be suffered by the party of the second part, their agents, servants, or by any other person or persons on or about said premises, by reason of leakage, fire, explosion, or other casualty occurring through any imperfection in, injury or damage to, or by reason of the operation of the said system or premises, or from any cause whatsoever.

20 The party of the second part covenants and agrees that, at the time of the signing of this agreement, the property or premises are free of all liens and encumbrances, and that after the execution of this agreement he shall not encumber the property or permit the property to become encumbered in any way, without the written consent of the party of the first part.

30 The party of the second part hereby agrees to make application for and secure necessary permits from the respective City and State authorities for the making of said improvements and the installing of said equipment, and for the storing, handling and dispensing of petroleum products on and from said piece of land first above described. Should any of said permits be refused or unduly delayed by the City and/or State authorities, then the party of the first part may at its election forthwith cancel this agreement.

The party of the second part shall pay for all water, gas and electricity used on the premises,

keep the premises and the improvements on the premises in a clean and neat condition and not misuse or permit to be misused any of the mechanical equipment placed upon the premises by the party of the first part.

This agreement shall continue in full force and effect for a further period of one year...from the end of the period hereinbefore stipulated, unless either party shall give written notice to the contrary, to the other party, sixty days prior to the termination of said first mentioned period; and after termination of said second period this agreement shall continue until termination by either party, by the giving of ninety days' written notice of such termination. 10

This agreement is not assignable without the written consent of the party of the first part.

All rights, remedies and liabilities herein given to, or imposed upon either of the parties hereto, shall extend to the respective heirs, executors, administrators, successors, and assigns of such party. IN WITNESS WHEREOF the parties have hereunto set their hands the day and year first above written. 20

THE ATLANTIC REFINING COMPANY,

By:

District Manager.

.....
.....
.....

WITNESSES:

.....
.....
.....
.....

30

....., 192 .

State of }
County of } ss.

Then and there personally appeared
....., Manager of the
..... District of the above mentioned The At-
lantic Refining Company, signer of the foregoing
instrument, and acknowledged the same to be his
free act and deed, and the free act and deed of said
corporation, before me.

10
....., 192 ..

State of }
County of } ss.

Then and there personally appeared
..... signer....of the foregoing
instrument and acknowledged the same to be.....
free act and deed, before me.

20
.....

OWNER'S RELEASE

30 The undersigned, owner of the land mentioned
under this agreement, at and upon which the herein
mentioned system is to be installed and improve-
ments are to be made, hereby acknowledges to have
received notice of the within Agreement, and assents
to the terms and conditions thereof, and in consid-
eration of the sum of One Dollar (\$1.00), well and
truly paid by THE ATLANTIC REFINING COM-
PANY, the receipt of which sum is hereby acknowl-
edged, and the furnishing, installing, and lending
of the said system by the said Company to the party
of the second part, and the making of said improve-

ments, hereby waives and releases all right to hold or levy upon said system, or any and all parts thereof, belonging to said THE ATLANTIC REFINING COMPANY, for rent or otherwise, and hereby consents that the said system or any and all parts thereof, may be removed from said land by THE ATLANTIC REFINING COMPANY, its successors or assigns, or their representatives at any time without notice or liability for any consequential or other damages to the undersigned other than to replace any physical property on said premises actually damaged in the removal of said system. 10

The undersigned further agrees that upon default of the party of the second part under the terms of the lease hereinbefore referred to, the undersigned will give to The Atlantic Refining Company forthwith written notice of said default, and if, by reason of said default, the undersigned has the right to terminate said lease and repossess himself of said leased land, that he will not terminate said lease or repossess himself of said leased land until fifteen days have elapsed from time of delivery to said The Atlantic Refining Company of such said written notice. 20

.....
Owner.

Witness:

.....

30

....., 192 .

State of }
County of } ss.

Then and there personally appeared
..... signer of the
foregoing instrument and acknowledged the same

to be free act and deed, before
me.

.....
RECORDED in the Office for Recording of Deeds
in and for in
Deed Book No.
page &c.

WITNESS my hand and seal of Office this
..... day of A. D. 192....

10

AGREEMENT

THE ATLANTIC REFINING CO.

20

.....
(Address)

AND

.....
(Name)

.....
(Address in full)

.....
(Installation)

30

.....
.....
.....
(Location)

EXHIBIT D3.

9/18/29L

ENDICOTT & ENDICOTT

Counsellors at Law
Atlantic City, N. J.

Allen B. Endicott
1880-1920

10

Allen B. Endicott, Jr.
John E. Iszard
M. Milton Singer

Union National Bank Building
Phones—Marine One and Two
December
Twenty-sixth
1928

20

Mr. Louis Kelly,
Delevan and Atlantic Avenues,
Margate City, N. J.
Dear Sir:

We have been employed by the Atlantic Refining Company to institute an injunction proceedings against you for the purpose of restraining you from selling any oil other than products of the Atlantic Refining Company at the above address. We are informed that you have erected a pump upon the adjoining lot and serve your customers from the corner property which has been improved with the apparatus of the Atlantic Refining Company. Reference to your contract will recall to your mind that the following provision was incorporated therein: "In consideration of the investment required, it is agreed that the above location shall be

30

used only for the sale of Atlantic Gasoline and Atlantic Motor Oils.”

We are writing this letter to advise you of our intentions so that you may remove the objectionable pump and discontinue the sale of competing gas and oils. If you desire to remove the pump, you should notify us not later than the 27th.

Very truly yours,

ENDICOTT & ENDICOTT,

By Allen B. Endicott Jr.

10 ABE jr;MVT

EXHIBIT D4.

9/18/29L

20 THE ATLANTIC REFINING COMPANY
No. 24043

260 South Broad Street

Philadelphia, Pa., -3/10/28 192...

Ledger No.....Folio.....Acet.....

LOUIS & JACK KELLY,
VENTNOR & DELAVAN AVES.,
MARGATE, N. J.

We this day CREDIT your account as follows:

Issued by WJG.

30 FOR THE VALUE OF THE FOLLOWING
DUE TO SAME CONTAINING WATER
20 GALS. ATLANTIC GASOLINE @ 16¢/18¢
GAL. 3.60

CONCLUSIONS (ORAL).

IN CHANCERY OF NEW JERSEY.

Between ATLANTIC REFINING COM- PANY, Complainant, and LOUIS and JACK KELLY, Defendants.	}	On Bill, etc. Final Hearing. Conclusions (Oral).	10
---	---	--	----

(These conclusions are not to be published in the official or unofficial reports. 20

MR. ALLEN B. ENDICOTT, JR., and MR. EMERSON RICHARDS, for complainant.
 MR. ALBERT A. F. MCGEE, for defendants.

INGERSOLL, V. C. : 30

The relief prayed for by the complainant is based upon a contract made between the complainant and the defendants. The contract was signed by Louis Kelly for Louis and Jack Kelly. It is now testified that Jack Kelly is no longer connected with the business.

Objection is made to this contract by the defendant for several reasons; first, that it was signed by him in blank and that a clause was inserted in that agreement which was not authorized, and which was done after the delivery by the agent of the complainant to the defendant, and it is alleged that is a material clause and that by such alleged insertion it invalidates the entire instrument. And secondly, that the instrument is subject to attack because of the fact there has been based thereon an alleged acknowledgment assumed to have been taken before a notary public by the two Kellys. It is admitted that that acknowledgment was not properly or legally taken.

I cannot assume that the addition of that improper and illegal form of acknowledgment to the paper invalidates the paper, nor can it be said that it places the complainant in such position before the Court that it could be said that it appeared before the Court with unclean hands. The most that can be said of it under any circumstances would be that it was an improper act by some person, without any authority, on the part of the company, having been shown.

Therefore, I do not consider that the acknowledgment has in any way invalidated the instrument.

The presumption is, of course, that the clause appearing in the instrument, which is challenged as having been inserted later, was properly placed in the agreement. I would have had no difficulty whatever upon that question were it not for the fact that Kelly produces an instrument or a paper purporting to be a copy of this contract sent to him by the proper officer of the company, stating it is a copy of the contract, in which this clause does not appear. That is explained by the clerk who wrote the letter and copied the instrument. She explains

and admits the error. I would still be in some doubt, perhaps, were it not for the fact that I am not satisfied with the statement of Mr. Kelly concerning the loss of copy, and therefore his failure to produce it. It did not appear to the Court that proper efforts were made to secure or produce before the Court his copy, or, rather, the copy which Kelly admits having had. That would have relieved all trouble, and it seems to me that Mr. Kelly must be placed in the position of not having satisfied the Court of the loss of that instrument, and his testimony concerning the absence of this clause is not sufficient for me to determine that that clause was not in the instrument at the time of its execution. I find as a fact that the instrument produced before me and offered in evidence as C3, exclusive, of course, of the acknowledgments, is and was the contract between this corporation and these or this defendant. 10

Kelly entered into this contract apparently with full knowledge of a new corporation and a new product, so far as he was concerned, at least. He was willing to take that chance of agreeing to sell this product alone in consideration of the agreement on the part of the complainant to do certain things on its part. The complainant did those things, has built and placed this equipment in this service station. It is true that the center driveway has been added to by making a concrete driveway for which both the complainant and the defendant paid a similar amount. 20 30

Upon the failure of Kelly to perform his part of the agreement, the complainant has three alternatives, first to go upon the premises and remove the pumps and other matters and charge Kelly with \$1,920, which Kelly and the company agreed was the reasonable cost of the installation and removal of

the system. Or they could allow said system to remain and charge the party of the second part the sum of \$2,820, the agreed value of the system and improvements. Third they could come into court and restrain the defendant from violating the terms of the contract. They chose the latter. Kelly, when he decides that he is not satisfied with the contract, does nothing further than to violate it. He doesn't take any steps toward cancelling it because of violation. He doesn't notify them that he considers it cancelled and rescinded, but simply refuses to perform his part of the contract. There is no doubt in my mind but that the complainant has the right to restrain Kelly from selling any other product—I am now limiting myself to the gasoline product for the moment—than that of the complainant company in the performance of this contract. That, I think, the complainants are entitled to have. I say they are entitled to that under ordinary circumstances—the difficulty which may arise is this, if they limited themselves by their contract to only two methods, have they not estopped themselves from taking the step which they have taken, that is, the application for an injunction? They have, under the terms of their contract, insisted that Kelly must permit them to do one of two things, and leave that option with the party of the first part. Party of the first part may immediately, at its option, without notice, and so forth, remove the fixtures, and charge the defendant with a certain amount for removal, or they may permit such system to remain and charge the defendant the value of the property, which is \$2,820.

Now, after, by its solemn contract in writing, agreeing to these two conditions, can they now come into court and say we won't take either of our options named by us, but we demand something else?

Supposing an injunction should be granted, what is the situation concerning, under this contract, these fixtures? I am in doubt upon that point and that, gentlemen, is the only point I have in the case. I haven't any doubt but that, unless the complainants are barred by their own contract, they are entitled to an injunction restraining this defendant from selling other products, which they agreed not to do. For that purpose I am ready to find that there has been no such violation as would permit the Kellys, 10 without notice or otherwise, to change their contract, in that they should become a partial station and still have the right to retain the gas.

(Argument.)

The Court: I am satisfied that an injunction will have to go in this case. If there is an appeal, I reserve the right to enlarge upon my oral memorandum. 20

Determined September 24, 1929.

FINAL DECREE.

(Filed Oct. 1, 1929.)

IN CHANCERY OF NEW JERSEY

10

Between

THE ATLANTIC REFINING
COMPANY, a corpora-
tion of Pennsylvania,
Complainant,

and

LOUIS KELLY AND JACK
KELLY,

Defendants.

On Bill for Injunc-
tion.
Final Decree.

20

This cause coming on to be heard in the presence of Endicott & Endicott, solicitors for the complainant, and Emerson L. Richards, of counsel, and Albert A. F. McGee, solicitor for the defendants, and the Court having examined the pleadings and having taken proofs orally in open Court, and having heard and considered the arguments of counsel

30

thereon. And it appearing to the satisfaction of the Court that the complainant is entitled to the relief prayed for by it and that the defendant is not entitled to the relief prayed for in his counter-claim, filed herein.

It is, on this 30th day of September, 1929, ordered,

adjudged and decreed that the said defendant, Louis Kelly, his agents and servants, and each and every one of them, be and they are hereby enjoined and commanded, henceforth until the second day of February, 1933, and thereafter until said agreement between the parties dated February 2, 1928, shall have been terminated, to desist and refrain from selling or distributing from the premises located at the northeasterly corner of Ventnor and Delavan Avenues, Margate City, New Jersey, or any part thereof, any gasoline, motor fuels, motor oils or greases, other than such products as shall have been purchased from The Atlantic Refining Company. 10

And it is further ordered, that the said defendant, Louis Kelly, pay to the complainant the costs of this suit to be taxed.

E. R. WALKER,
C.

Respectfully advised,
R. H. INGERSOLL,
V. C.

20

30

ORDER SUPPLEMENTING FINAL DECREE.

(Filed Oct. 7, 1929.)

IN CHANCERY OF NEW JERSEY.

10

Between

THE ATLANTIC REFINING
COMPANY, a corpora-
tion of Pennsylvania,
Complainant,

and

LOUIS KELLY AND JACK
KELLY,

Defendants.

} On Bill for Injunc-
tion.
} Order Supplementing
} Final Decree.

20

It appearing to the Court that the final decree in this matter enjoins and commands the defendant, Louis Kelly, his agents and servants, to desist and refrain from selling or distributing from the premises located at the northeasterly corner of Ventnor and Delavan Avenues, Margate City, New Jersey, or any part thereof, gasoline and other products in said order specified, without defining the limits of the said northeasterly corner, and the Court being of the opinion that said order should define the boundaries of said northeast corner.

It is, on this seventh day of October, nineteen hundred and twenty-nine, ordered, adjudged and decreed that the premises located at the northeasterly

corner of Ventnor and Delavan Avenues, Margate City, New Jersey, comprise all that certain tract of land particularly bounded and described as follows:

BEGINNING at a point being the Northeast-
erly intersection of Ventnor and Delavan Ave-
nues and extending thence (1) Eastwardly, in
the Northerly line of Ventnor Avenue, forty-two
feet; thence (2) Northwardly, parallel with Del-
avan Avenue, seventy-five feet; thence (3) West-
wardly, parallel with Ventnor Avenue, forty- 10
two feet; thence (4) Southwardly, in the east-
erly line of Delavan Avenue, seventy-five feet
to the place of beginning.

E. R. WALKER,
C.

Respectfully advised,
R. H. INGERSOLL,
V. C.

20

I consent to the entry of the above order.

.....,
Solicitor for Defendants.

30

NOTICE OF APPEAL.

(Filed Oct. 10, 1929.)

IN CHANCERY OF NEW JERSEY.

10

Between

ATLANTIC REFINING Co.,
a corporation of Penn-
sylvania,*Complainant,*

and

LOUIS KELLY AND JACK

20

KELLY,

*Defendants.*On Bill, &c.
Notice of Appeal.

30 The defendants, Louis Kelly and Jack Kelly, hereby appeal from the final decree made by the Chancellor on the advice of Vice-Chancellor Robert H. Ingersoll, on the thirtieth day of September, nineteen hundred and twenty-nine, and from the whole and every part hereof to the Court of Errors and Appeals in the last resort in all causes.

Dated October 9, 1929.

ALBERT A. F. MCGEE,
Solicitor for and of Counsel with Defendants.

I conceive there is good cause for appeal in the above-entitled cause.

ALBERT A. F. MCGEE,
Counsel.

[ENDORSEMENT]

10

Due and legal service acknowledged
this 9th day of October, 1929.
Endicott & Endicott,
Solicitors for Complainant.

20

30

NOTICE OF APPEAL.

(Filed Oct. 16, 1929.)

IN CHANCERY OF NEW JERSEY.

10

Between	ATLANTIC REFINING Co., a corporation of Penn- sylvania,	}	On Bill, etc. Notice of Appeal.
	<i>Complainant,</i>		
	and		
20	LOUIS KELLY and JACK KELLY,		
	<i>Defendants.</i>		

30 The defendants, Louis Kelly and Jack Kelly, hereby appeal from the order supplementing final decree made by the Chancellor on the advice of Vice-Chancellor Robert H. Ingersoll, on the seventh day of October, nineteen hundred and twenty-nine, and from the whole and every part thereof to the Court of Errors and Appeals in the last resort in all causes. Dated October 15th, 1929.

ALBERT A. F. MCGEE,
*Solicitor for and of Counsel
with Defendants.*

I conceive there is good cause for appeal in the above-entitled cause.

ALBERT A. F. MCGEE,
Counsel.

[ENDORSED]

10

Service of copy of within acknowledged this 15th day of October, 1929, as to the complainant.

Endicott & Endicott,
Solicitors for and of Counsel
with Complainant.

20

30

PETITION OF APPEAL.

(Filed Oct. 31, 1929.)

NEW JERSEY COURT OF ERRORS
AND APPEALS.

10

Between

THE ATLANTIC REFINING
COMPANY, a corporation
of Pennsylvania,
Complainant-Appellee,
and

20 LOUIS KELLY and JACK
KELLY,
Defendants-Appellants.

On Appeal from the
Court of Chancery.
Petition of Appeal.

*To the Honorable, the Court of Errors and Appeals,
in the Last Resort in all Causes:*

The petition of Louis Kelly, appellant in the
above-entitled cause, respectfully shows that:

- 30 1. Petitioner finds himself aggrieved by a final de-
cree made in the Court of Chancery by his Honor,
Edwin Robert Walker, Chancellor of the State of
New Jersey, upon the advice of Honorable Robert H.
Ingersoll, one of the Vice-Chancellors of said court,
bearing date the thirtieth day of September, 1929,
as supplemented by an order made in the Court of

Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, upon the advice of Honorable Robert H. Ingersoll, one of the Vice-Chancellors of said court, bearing date the seventh day of October, 1929, in said cause in said Court of Chancery, wherein the said Atlantic Refining Company, a corporation of the State of Pennsylvania was complainant, and the said Louis Kelly and Jack Kelly were defendants, in this respect, to wit: That the said decree and order supplementing said decree adjudged that the said defendant, Louis Kelly, for the time therein specified desist and refrain from selling or distributing from the premises located at the northeast corner of Ventnor and Delavan Avenues, Margate City, New Jersey, or any part thereof, any gasoline, motor fuels, motor oils or greases, other than such products as shall have been purchased from The Atlantic Refining Company, a corporation of the State of Pennsylvania; and that said defendant, Louis Kelly, pay to complainant, the costs of said suit to be taxed.

Petitioner appeals from said decree and order supplementing decree of the Chancellor, which decrees as aforesaid, upon the grounds that the same are erroneous for that:

1. According to the law of the land and the practice of the Court of Chancery, the relief prayed for by said bill of complaint should have been denied and said bill dismissed.

2. That the said Court found that the said complainant was entitled to the relief prayed for, whereas it should have found that the said complainant did and was bound to pursue the adequate remedy at law.

3. That said Court granted to complainant the relief prayed for, whereas it should have found for the defendants, for the reason that

complainant had an adequate remedy at law, and that complainant failed to show any irreparable injury by reason of any of the alleged acts of the defendants.

4. That the said Court improperly refused to hear testimony offered in behalf of the defendants to show:

10 1. That the supposed contract, offered in evidence by the complainant, was either void or not in fact or in truth the contract entered into between the complainant and defendant, but had, in truth and in fact, been subjected to a material alteration by the complainant, its agents or servants.

20 2. That the supposed acknowledgment attached to and made a part of the contract was not in truth and in fact the acknowledgment of the defendants therein, but was false and fraudulent and obtained by fraud of the complainant.

3. That the oil products tendered by complainant to defendants in the attempted performance of the contract hereinbefore mentioned, were inferior in quality, entirely unsuitable for sale in the course of defendants' business, and unfit for the purposes that they were intended to fulfill.

30 4. That the complainant failed and refused to perform the obligation it assumed under the purported contract offered in evidence, in that it consistently failed and refused to sell to said defendants the products set forth in said purported contract, at the prices agreed upon therein.

whereas the said Court should have admitted such testimony and all of such testimony designed and

intended to establish the matters hereinabove set forth.

Petitioner therefore prays that the said decree and order supplementing final decree of the said Chancellor may be fully reversed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as to this Court shall seem proper.

ALBERT A. F. MCGEE, 10
*Solicitor for and of Counsel
with Appellant.*

ANSWER TO PETITION OF APPEAL.

(Filed Nov. 8, 1929.)

NEW JERSEY COURT OF ERRORS 20
AND APPEALS.

Between

THE ATLANTIC REFINING
COMPANY, a corporation
of Pennsylvania,
Complainant-Appellee,
and

LOUIS KELLY and JACK
KELLY,
Defendants-Appellants.

} On Appeal from the
Court of Chancery.
Answer to Petition of
Appeal. 30

The answer of The Atlantic Refining Company, the above-named appellee, to the petition of appeal

of Louis Kelly and Jack Kelly, the above-named appellants.

This appellee, not admitting the truth of all or any of the matters in said petition of appeal contained, for answer thereto nevertheless admits that a decree was on September 30th, 1929, and an order supplementing the said decree was on October 7th, 1929, made and entered in the Court of Chancery of New Jersey in the above-entitled cause, for the
10 purposes in said petition mentioned and as therein set forth; but as to the substance and form of the said decree and the said order supplementing the said decree, this appellee begs leave to refer thereto when the same shall be produced.

This appellee is advised and believes that the said decree and the said order supplementing the said decree are agreeable to equity; and he prays that the same may be affirmed with costs to be taxed in favor of this appellee.

20

ENDICOTT & ENDICOTT,
*Solicitors for and of Counsel
with Appellee.*

[ENDORSED]

30

Service of the within answer and copy thereof acknowledged this 6th day of November, 1929.

Albert A. F. McGee,
Solicitor of Appellants.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between

THE ATLANTIC REFINING COMPANY, a corporation
of Pennsylvania,
Complainant-Appellee,

and

LOUIS KELLY and JACK KELLY,
Defendants-Appellants.

ON BILL, ETC.

BRIEF OF DEFENDANTS-APPELLANTS.

FACTS.

This suit was brought by the complainant-appellee to restrain the defendants from selling or distributing any gasoline or motor fuels manufactured or sold by any other than the complainant-appellee.

The suit is based upon an agreement entered into between the complainant-appellee and the defendants-appellants, dated February second, 1928. This agreement was in writing and provided, in

part, that the complainant-appellee was to install on the property at the northeast corner of Delavan and Ventnor Avenues, Margate City, New Jersey, which the defendants-appellants leased, certain equipment for the sale and distribution of gasoline and motor fuels. In pursuance of this agreement, the complainant-appellee installed the equipment mentioned in the agreement and the defendants-appellants took over the operation of the filling station and proceeded to sell complainant-appellee's products. Thereafter, and during the month of December, 1928, the defendants-appellants installed, or had installed, gasoline pumps and equipment for the sale of gasoline and motor oils of the Tide Water Oil Company, a competitor of complainant-appellee. Complainant-appellee thereupon, and on the tenth day of January, 1929, filed its bill in the Court of Chancery, asking that the defendants-appellants be enjoined from selling or distributing gasoline and motor oils of any company other than their own.

The agreement in question provided, among other things, that the equipment aforementioned should remain the property of the Atlantic Refining Company, and further, that in the event that the defendants-appellants should at any time cease to purchase all gasoline, motor oils, etc., from the said company, or fail to pay promptly, or default in any other way, then the said Atlantic Refining Company could, without notice, take immediate possession of the said equipment and remove the same from defendants-appellants' premises, and could charge the defendants-appellants the sum of nineteen hundred twenty dollars (\$1,920), which said agreement fixed as a fair and reasonable cost of the installation and removal of the system and equipment, and further, that the said Atlantic Re-

fining Company could allow said system and equipment to remain and charge the defendants-appellants the sum of twenty-eight hundred twenty dollars (\$2,820), the agreed value of the system and equipment.

Upon the trial of the issue below, defendants-appellants filed an answer in the suit, wherein they denied that they had violated the terms of the agreement and, on their part, set up and alleged numerous violations on the part of the complainant-appellee, to wit, failure on the part of the complainant-appellee to supply them with good and marketable gasoline, and failure to allow discounts which had been agreed upon between them. Defendants-appellants, in their counter-claim, asked for the cancellation of the agreement and what other relief they might be entitled to under the facts set forth.

Upon the trial of the issue, various disputes of fact arose:

First and foremost, the complainant-appellee relied upon a clause which they claimed was part of the contract, which was as follows:

“In consideration of the investment required, it is agreed that the above location shall be used only for the sale of Atlantic Gasoline and Atlantic Motor Oils.”

The defendants-appellants contended that this clause was not in the original agreement, but that it had been inserted by the complainant-appellee after the execution and acknowledgment of the agreement.

Secondly, the defendants-appellants contended that after the making of the written contract, above

referred to, a further and parol agreement had been entered into between the parties, whereby they, the defendants-appellants, were to purchase gasoline from the complainant-appellee at a price \$.02 per gallon under the tank wagon price, the price agreed upon in the written agreement, and that they were to receive a further discount of \$.005 additional per gallon, whenever they purchased ten thousand (10,000) or more gallons of gasoline per month. The complainant-appellee denied the making of this agreement, and further denied the breach of it.

Thirdly, the defendants-appellants contended that the gasoline supplied by the complainant-appellee contained water and was otherwise dirty and discolored, and as a result of it they were unable to retain their customers and lost a great deal of business. This, likewise, was denied by the complainant-appellee.

Fourthly, the defendants-appellants contended that the written agreement, dated the second day of February, 1928, as executed by them, was not acknowledged. The complainant-appellee at the trial denied this fact, and further denied that the defendants-appellants had never appeared before a notary, and that the acknowledgment was erroneously and wrongfully taken. They further contended that this acknowledgment was no part of the contract, and that this wrongful act on their part had no effect upon the validity of the contract as a whole.

ARGUMENT AS TO THE FACTS.

The argument as to the facts will be divided into four parts:

1. As to the alteration of the agreement in writing.
2. The question as to the acknowledgment affixed to the agreement.
3. As to the making by the parties and breach by the complainant-appellee, of the parol agreement as to discounts.
4. The question as to the quality of the gasoline supplied to the defendants-appellants.

Mr. Cox, who said that he was the South Jersey District Manager of The Atlantic Refining Company, testified that at the time of the execution of the agreement, the clause above quoted was inserted, typewritten in and made a part of the contract. The testimony of all parties was that the agreement was executed in duplicate. This agreement is set out in full as attached to complainant-appellee's bill, on page 7 of the State of the Case, and as the Complainant-Appellee's Exhibit C3, on page 235 of the State of the Case. With the exception of the names of the defendants-appellants, the situation of the premises, the dates, and the enumeration of the equipment and the distributing clause, the agreement was printed. Mr. Cox testified that at the time the agreement was executed

by all the parties, it was filled out and that it was then signed by the defendants-appellants and then taken by him to Philadelphia for execution by Harold B. Stone, the District Manager of The Atlantic Refining Company, and he returned one copy to the defendant-appellant, Louis Kelly. Both of the defendants-appellants, on the other hand, testified that at the time that the agreement was presented to them, it was in blank, and that there was nothing thereon excepting the printed portions thereof; that thereupon Mr. Cox took the agreement to Philadelphia, and thereafter returned one copy to them. Their testimony is clear and convincing that neither upon the execution of the agreement by them or upon its return, was the clause in question in the agreement. Louis Kelly's testimony was further to the fact that thereafter he lost or mislaid his copy of the contract and that he thereupon wrote to Mr. Stone, the district manager of the complainant-appellee, asking for a copy of same; that said copy was sent to him and is set forth in the State of the Case at page 250. It will be noted that this agreement, designated as Exhibit D2, did not contain the clause in question. Accompanying this agreement was a letter from Harold B. Stone, Manager of Sales of the Philadelphia District of The Atlantic Refining Company, which is marked as Exhibit D1, and may be found on page 249 of the State of the Case. In this letter, Mr. Stone said:

“* * * we are attaching hereto a copy of the agreement which you executed, and the agreement carries with it the entire terms.”

Upon rebuttal, the complainant-appellee attempted to rebut the testimony of the defendants-appellants by calling Miss Anna Howard, who testified (see

page 213 of the State of the Case) that she was presently employed by The Atlantic Refining Company, as stenographer to Mr. Stone. Miss Howard testified that she wrote the letter above mentioned, designated Exhibit D1, and that she likewise copied the agreement designated Exhibit D2. She testified that in making the copy she omitted to insert the clause in question. It will be seen from her cross-examination, beginning on page 214 of the State of the Case, that this poor girl knew nothing whatsoever of what had happened, and that her testimony can be given little, if any, credence. She was still in the employ of the said company, and up to the date of the trial, had thought herself that she had made a correct copy of the agreement. Under the circumstances, there was nothing for this girl to do but testify that she had made a mistake. It is likewise significant in this connection that her immediate superior, Mr. Stone, who had written the letter in question, and who had directed her to make a copy of the contract for the defendants-appellants, and was supposed to have executed it in all its terms, was not present at the time of the trial, although he was bound to know of its imminence. Complainant-appellee again attempted to contradict the testimony of the defendants-appellants in respect to this alteration of the contract, by calling one, Thomas H. McCool, an alleged handwriting expert. His testimony in respect to this clause begins at line 29, on page 224 of the State of the Case, and was merely to the effect that the clause had, in all probability, been made on the same typewriter as the rest of the typewritten portion of the agreement, and that in all probability it had been made at the same time. However, it seems to us that this testimony is of no value whatsoever. Any reasonable human being who desired

to insert a clause in typewriting in an agreement which had already been typewritten upon, would get the same person to do it and use the same typewriter as was the rest of the agreement. The testimony of the complainant-appellee itself was that the agreement was prepared in Philadelphia, and in the office of Mr. Stone, who had charge of such matters for the company. Of course, the alteration would be made on the same typewriter. It would be very unusual to use another typewriter for such a purpose. As to Mr. McCool's testimony that the typewriting was done at the same time, this is just unbelievable. His testimony was faulty and hesitant in this respect and it is impossible for him or anyone else to say that it was made at the same time.

It is submitted that the testimony of the defendants-appellants in connection with this part is much more worthy of consideration than that of the complainant-appellee's witnesses, and that in this question, at least, the defendants-appellants should have prevailed.

The second state of fact to be argued is the acknowledgment which was affixed to the agreement. It is not necessary to argue this at great length from the factual standpoint, as the complainant-appellee itself admits that the defendants-appellants never appeared before the notary and that the acknowledgment was improperly and illegally taken. The solicitor of the complainant-appellee, Hon. Emerson L. Richards, during the trial, made the following pertinent statement in reference to the acknowledgment (see page 65 of the State of the Case, line 6):

“We have specifically said, if your Honor please, that we are not relying upon these ac-

knowledgments, they are not part of the contract, and the contract did not have to be acknowledged, and we frankly stated that the acknowledgment is unquestionably irregular and it is not any part of our case."

At the trial, complainant-appellee's counsel insisted at several times that this acknowledgment was not a necessary part of the agreement and that it had no bearing upon the case, and the Court refused to hear testimony regarding it. It may be true, and probably is, that the agreement was neither good nor bad because of the presence or lack of such an acknowledgment. However, it becomes of grave importance when one considers the lack of fair dealing and truthfulness of the complainant-appellee and its witnesses. The Courts in this State have frequently condemned notaries public and other officers for taking acknowledgments when the person never appeared before them, and the Courts have, with equal severity, condemned those who caused the notary to act in such a manner. It is certainly important in the consideration of this case that this conduct on the part of the complainant-appellee be carefully scrutinized. If they were capable of causing false and admittedly false acknowledgments to be taken, are they not quite capable of altering the contract after it was executed and conducting this whole transaction in an improper and fraudulent manner? Could any credence whatsoever be given to the testimony of people who come into the court of equity and complacently admit the falsification of an acknowledgment? We cannot too strongly urge that the trial Court should have heard all of the testimony offered in regards to this acknowledgment as bearing upon the credibility of the complainant-appellee's wit-

nesses and as to their conduct in the matter of the contract.

The third factual point to be considered is the making of the parol agreement concerning discounts. Both of the defendants-appellants testified to a conversation or conversations with Mr. Cox (see page 106 of the State of the Case, lines 9 to 19), when, shortly after the making of the written contract, he came to them and stated that owing to the fact that they were selling a comparatively new product in that territory, that he thought they were entitled to a special consideration, and that the company would therefore allow them a discount of \$.02 per gallon under the regular tank wagon price, and that if they purchased ten thousand (10,000) gallons or more per month, they would be allowed an additional discount of \$.005 per gallon. This testimony on the part of the defendants-appellants was corroborated by Albert Hentzel (see page 196 of the State of the Case). Mr. Hentzel testified that he was a distributor of Atlantic gasoline, and that during the time that he was what is described as a one hundred per cent dealer, that is, sold nothing but Atlantic products, that he was allowed a discount of \$.02 per gallon under the tank wagon price. To the same effect is the testimony of Francis J. Mulholland (see page 199 of the State of the Case). It was apparently the custom of this company to allow such discounts to service stations which used Atlantic products exclusively, and this was not denied by the complainant-appellee. The complainant-appellee, by its Mr. Cox, stated that there was no such agreement and that this discount was merely given out of the kindness of their hearts. However, the fact that there was an agreement is corroborated by the fact that the company did pay such a discount for several months after

the opening of the service station by the defendants-appellants. They paid both the \$.02 per gallon discount and the \$.005 per gallon discount, when the gallonage went over ten thousand (10,000) gallons per month. The testimony of the defendants-appellants is also clear and uncontradicted, that on May 10th, 1928, the complainant-appellee stopped giving the discount of \$.005 per gallon, and on July of the same year, the complainant-appellee ceased giving the discount of \$.02 per gallon, although the defendants-appellants protested concerning the same. No one but Mr. Cox denied the making of this contract. It might be appropriate at this time to call the attention of the Court further to this man, Cox. In his affidavit, which was annexed to the bill of complaint in this cause, beginning on page 5 of the State of the Case, he says that he negotiated the contract between Louis Kelly, Jack Kelly and The Atlantic Refining Company. He further says, referring to the contract in this case, that:

“Said contract was reduced to writing, and a true copy thereof is attached to the foregoing bill” (see page 5 of the State of the Case, beginning line 34).

The Court's attention is directed to the fact that the copy of the contract attached to the bill contained the acknowledgment above referred to. This man, Cox, in his affidavit, swore that the whole thing was true, the acknowledgments and all, although later and in the trial of the case, he admitted that the acknowledgments were false, and insisted that they were not part of the contract. The testimony of such a man could not be believed in any particular whatsoever. It is submitted to the Court that the great weight of evidence concerning the

discount question is in favor of the defendants-appellants and should have been decided in their favor.

The third factual question is concerning the quality of the gasoline sold by the complainant-appellee to the defendants-appellants. The testimony of both of the defendants-appellants was that the gasoline sold them contained water to such an extent that their customers had a great deal of difficulty in using it in their automobiles. That the company admitted this was true is shown by the fact that on March 10th, 1928, they gave credit to the defendants-appellants for gasoline purchased from them. This credit was embodied in a credit memorandum which was offered in evidence and marked Exhibit D4, and shown on page 260 of the State of the Case. It contained these significant words:

“for the value of the following due to same containing water, 20 gals. Atlantic gasoline.”

The testimony likewise on the part of the defendants-appellants was that they lost a great number of customers because of the inferior gasoline received by them from the complainant-appellee. This testimony was not contradicted and was particularly admitted by the fact that Cox took a sample of the gasoline from the defendants-appellants' tanks for analysis. It is significant that he never had this sample analyzed, or, at least, never made any report to the defendants-appellants, although they on several occasions asked him for a report. It is submitted that the testimony is clear and unmistakable that the quality of the gasoline sold by the complainant-appellee was or became of an inferior quality and that it was impossible for the

defendants-appellants to conduct their business based upon the sale of such merchandise.

ARGUMENT AS TO LAW.

There are several legal questions involved in this cause. One of the first and most important of these questions is whether the Court of Chancery had jurisdiction of the cause because of the fact that the complainant-appellee had an adequate remedy at law. It is axiomatic that if a party who claims to be aggrieved has an adequate remedy at law, equity will not enforce his contract by injunction.

“An injunction restraining the breach of a contract is a negative specific enforcement of that contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are governed by the same doctrines and rules; and it may be stated as a general proposition that wherever the contract is one of a class which will be affirmatively specifically enforced, a court of equity will restrain its breach of injunction” (4 *Pomeroy's Equity Jurisprudence*, Section 1691).

Nowhere in the contract in question does it appear that the complainant-appellee, The Atlantic Refining Company, is compelled to supply the defendants-appellants with gasoline and motor fuels. Therefore, there is no mutuality in the contract, since the defendants-appellants could not go into equity and compel the complainant-appellee to perform. On the other hand, no one would seriously

contend that the defendants-appellants could be affirmatively compelled to purchase gasoline from the complainant-appellee. The contract does not fall within that class of case where the negative restriction may be enjoined.

Professor Pomeroy also says in the same volume, in Section 1721:

“In all these cases, if the breach of the contract, committed or threatened, can be adequately redressed by the recovery of damages in a single suit at law, injunction will not issue to restrain the breach.”

See the case of *The Sperry & Hutchinson Company against Vine*, reported in 66 New Jersey Equity, 339, decided by this Court. In that case, with which the Court is undoubtedly familiar, the defendants had agreed to use trading stamps supplied by the complainant and not to use those of any other company. The defendants used other stamps and the complainant sued to restrain their use. This Court said, in denying the injunction:

“* * * The jurisdiction to decree specific performance is based upon the inability of Courts to give adequate relief.”

It was stated that, as damages could be calculated, the remedy at law was adequate.

This case has been followed in this State, in the recent case of *East Jersey Water Company against Newark*, 96 N. J. Equity, 231, and *Radio Corporation, etc., against De Forest, etc.*, 97 N. J. Equity, 37 and 43.

The great weight of opinion in this country follows the principle just set forth. A particularly good example of this is found in the case of *Hardy*

against *Allegan Circuit Judge*, reported in 147 Mich. 594, 10 L. R. A. (N. S.) 47. This was a case where there was an agreement on the part of the defendant not to sell beer of any brewery but that of complainant. The Court said:

“In my judgment, the agreement respecting the sale of beer * * * is one which will not be enforced for the very simple reason that the remedy at law for damages is entirely adequate.”

The Court further discussed the question and said that all the complainant was entitled to was for damages for loss of profits, and that they could be calculated and recovered at law.

An interesting note on this subject is contained in 10 L. R. A., N. S. 474. There is cited the case of *Dewey Hotel Company against the United States Electric Lighting Company*, 17 App. D. C. 356. It appears that in this case there was a contract for the exclusive supply of light and steam to be used in certain premises. The owner of the property installed conduits for the supply of a similar product by another company. The Court held that the remedy of the first company was at law for damages, and therefore refused to issue a restraint.

Many of the cases cited in this note, where an injunction is allowed, are decided upon the question of the complaining party having made large additional investments on account of the contract, or having discontinued the manufacture or sale of some article of its own because of the contract, or where the contract was inherently one which made it difficult to ascertain value. In the instant case, however, there are no allegations or proof whatsoever that it is impossible to ascertain or calculate

damages at law, nor is there any allegation of a large investment made by the complainant upon the strength of the contract which it is unable to realize upon, nor, again, is there any allegation of insolvency, or the inability to realize upon a judgment recovered at law against the defendants.

The above citations of authority certainly set forth the law of the land in respect to injunctions, such as is sought in this case. It might be argued that the case of *Feigenspan against Nizolek*, 71 N. J. Equity, page 382, followed by the later case of *People's Brewing Company against Levin*, 81 Atlantic, page 1114, settled the law in respect to this matter. However, the decision in these two cases did not, at least in terms, reverse the opinion of the decision of this Court in the *Sperry & Hutchinson Company against Vine*, cited *supra*, and it is interesting to note that both of the above cases were affirmed by this Court by very short *per curiam* opinions. The instant case can further be distinguished from either the Michigan case and the Feigenspan case in the fact that the contract in question in this case contains a plain and unmistakable provision for liquidated damages upon the breach of it by the defendants. There is no question but that the parties intended that the only remedy should be an action at law for the recovery of the sums mentioned in the agreement itself. In the opening of this brief, those amounts were set forth, but it might not be amiss to again repeat them. The contract provided that upon the default of the party of the second part (the defendants-appellants herein), for any reason, either from failure to purchase all gasoline, motor fuels, motor oils and grease handled and distributed by the party of the first part (the complainant-appellee herein), or for failure to purchase a minimum amount of

said products, or for removing the system of equipment without the permission of the party of the first part, or for a number of other reasons, then "the party of the first part may immediately, or thereafter, at its option, without notice to the party of the second part, take immediate possession of the said system and remove the same without let or hindrance, with or without process of law, without the party of the first part or its agent or agents, or the officers of the law, becoming in any way liable for trespass, claims for injury or damage in the removal of the said system, and charge the party of the second part with the sum of nineteen hundred twenty dollars (\$1,920), which, it is agreed, is the fair and reasonable cost of the installation and removal of the system and the cost of the improvements mentioned hereunder, and thereupon said sum charged shall immediately become due and payable by the party of the second part; or allow said system to remain and charge the party of the second part with the sum of twenty-eight hundred twenty dollars (\$2,820), the agreed value of the system and improvements, and thereupon said sum charged shall immediately become due and payable by the party of the second part, and upon the payment of said sum title to said system is to pass from the party of the first part to the party of the second part."

There is no question but that the above provision provided for liquidated damages. The company has figured what sum or sums are necessary to indemnify them and has set it forth in the agreement as liquidated damages.

"* * * there is a line of cases holding that where liquidated damages are stipulated for, injunctive relief must be denied, the argument

being that the ground of the jurisdiction is the inadequacy of the legal remedy. When parties have stipulated as to the amount of damages, the difficulty is removed. Accordingly, the legal remedy is held to be exclusive.”

4 *Pomeroy's Equity Jurisprudence*, 4th Edition, Section 1722, page 4010.

One of the leading cases in connection with this statement of Pomeroy's is that of *Dills against Doeblor*, a case decided by the Supreme Court of Errors of Connecticut and reported in 26 Atlantic, page 398. In that case the Court said:

“The universal test of the jurisdiction of a court of equity to restrain the breach of a contract is the inadequacy of the legal remedy of damages. An injunction to prevent the breach of a contract is a negative specific enforcement of that contract; and the jurisdiction of equity to grant such an injunction is substantially coincident with its jurisdiction to compel a specific performance by an affirmative decree. In either case a court of equity cannot exercise jurisdiction unless the injury apprehended from a violation of the contract is of such a nature as not to be susceptible of adequate damages at law. Pom. Eq. Jur. 1341; High, Inj. 695; *Morris Canal & Banking Co. v. Society for Manufactures*, 5 N. J. Eq. 203; *Akrill v. Selden*, 1 Barb. 315. When the parties to an agreement have put into it a provision for the payment, in case of a breach, of a certain sum of money, which is truly liquidated damages, and not a penalty—in other words, when the contract stipulates for one of two things in the alternative, or on the one side the doing

or the not doing of certain acts, and on the other the payment of a certain sum in money in lieu thereof—equity will not interfere, but will leave the party to his remedy of damages at law. *Shiell v. McNitt*, 9 Paige, 101; *Skinner v. Dayton*, 2 Johns, Ch. 526, 535; Pom. Eq. Jur. 447.’’

Another important case on this question is that of *Bartholomae & Roesing Brewing & Malting Co. against Modzelewski*, decided by the Supreme Court of Illinois, and found in 109 N. E. 1058. In that case the defendant agreed to buy beer from the plaintiff. The facts were that after entering into that contract, the defendant bought beer from another company. The Court says that:

“This brings us to the question: Has appellant an adequate remedy at law? By the eighth paragraph of the contract it is specifically provided that, if appellees shall at any time fail to keep and live up to the covenants and agreements of their contract, and shall make default in part of the contract and fail to purchase all of the draught beer of the party of the first part as therein provided for, then and in that event they shall pay to the party of the first part, as liquidated damages, the sum of \$50 per month for each and every month and fraction of a month covering the unexpired period of the contract * * *”

The Court then went on to discuss the question as to whether the sum of \$50 a month was a penalty or liquidated damages, and decided that it was the latter. The Court then went on to say:

“If an injunction were to be issued, under

the facts admitted in this case, to prevent a breach of this agreement, we fail to see how an injunction could be refused in any case to prevent the breach of all similar contracts where a business man agreed to sell in his place of business the products of a certain dealer and to refuse to sell any others. This would, in our judgment, be opposed to both reason and authority."

Following this, the Court went on to say:

"For these reasons, we think the Court did not err in dissolving the injunction and dismissing appellant's bill for want of equity."

It would be an easy matter to go on indefinitely citing cases of almost all the States of the Union to the same effect as these just set forth. It is submitted that there is no question but that the amounts reserved in the contract between the complainant-appellee and the defendants-appellants in this case, were for liquidated damages, and that therefore the complainant-appellee had an adequate remedy in law and that equity has no jurisdiction.

Another most important question involved is whether or not the alteration in the contract was a material one. In the case of *Christopher A. Schmidt, et ux., against Charles Quinzel*, 55 N. J. E. 792, decided by this Court, one of the defendants authorized an auctioneer to sell the premises at auction, and the auctioneer accordingly sold the same to the complainant, understanding that he was representing one of the defendants, and later he appeared at the offices of the complainant's attorney and added the name of the other defendant. That being done, this bill was filed against both the de-

defendants for specific performance. The Court said, in denying the injunction:

“* * * the alteration made in the instrument by the complainant’s agent, and at his request, in November, was certainly a material one.

The alteration considerably enlarged the scope of the instrument as a means of evidence, and therefore was a material one. Having been made by the other party, the complainant, it annulled the instrument as a contract, or as evidence of a contract, in his favor.” Also, the cases of *Hunt v. Gray*, 6 Vr. 227; *Jones v. Crowley*, 28 Vr. 222.

The defendants-appellants were notified first by the attorney for the complainant-appellee and then, in the bill of complaint, that the complainant-appellee was relying upon a clause which they insisted was a part of the contract, which reads as follows:

“In consideration of the investment required, it is agreed that the above location shall be used only for the sale of Atlantic gasoline and Atlantic motor oils.”

which aforementioned clause did not appear in the copy of the contract sent to the defendants-appellants, and as testified to by the defendants-appellants, was not a part of the contract when it was executed by them.

The final question to be argued is whether or not the complainant-appellee violated the terms of its contract. The complainant-appellee refused to carry out the terms of its contract in allowing the defendants-appellants the discounts that were agreed upon. The quality of the gasoline had decreased, insofar as there was considerable water

in it, which was shown by the credit memorandum as set forth under the facts of this brief; also, that the detonation qualities of the gas had decreased, and that the customers complained of this.

See *Pomeroy's Specific Performance*, 3rd Ed., page 762:

“If the plaintiff’s simple negative conduct, his neglect to do what he has undertaken to do, is sufficient to prevent his obtaining the remedy of specific performance, much more does the same result follow from his affirmative acts which are in direct violation of the contract.

It is the fundamental doctrine upon which the specific enforcement of contracts in equity depends, that either of the parties seeking to obtain the equitable remedy against the other must, as a condition precedent to the existence of his remedial right, show that he has done or offered to do, or is then ready and willing to do, all the essential and material acts required of him by the agreement at the time of commencing the suit.”

See the case of *August Schlegel v. Charles J. Bott*, 93 N. J. E. Reports, page 607, decided by this Court. The facts were that Bott, the owner of the premises, executed an indenture of lease to Schlegel, for a term of years, which included an option to purchase the premises in accordance with the terms of a written agreement entered into between the parties, on the same day upon which the lease was executed, in which case the sum of \$1500, being a deposit with the lessor, was to be credited upon the purchase price. The complainant demanded the conveyance of the property. The defendant refused to comply with this demand upon the grounds that

the lease which was executed in 1917 had never become operative. Decree confirmed.

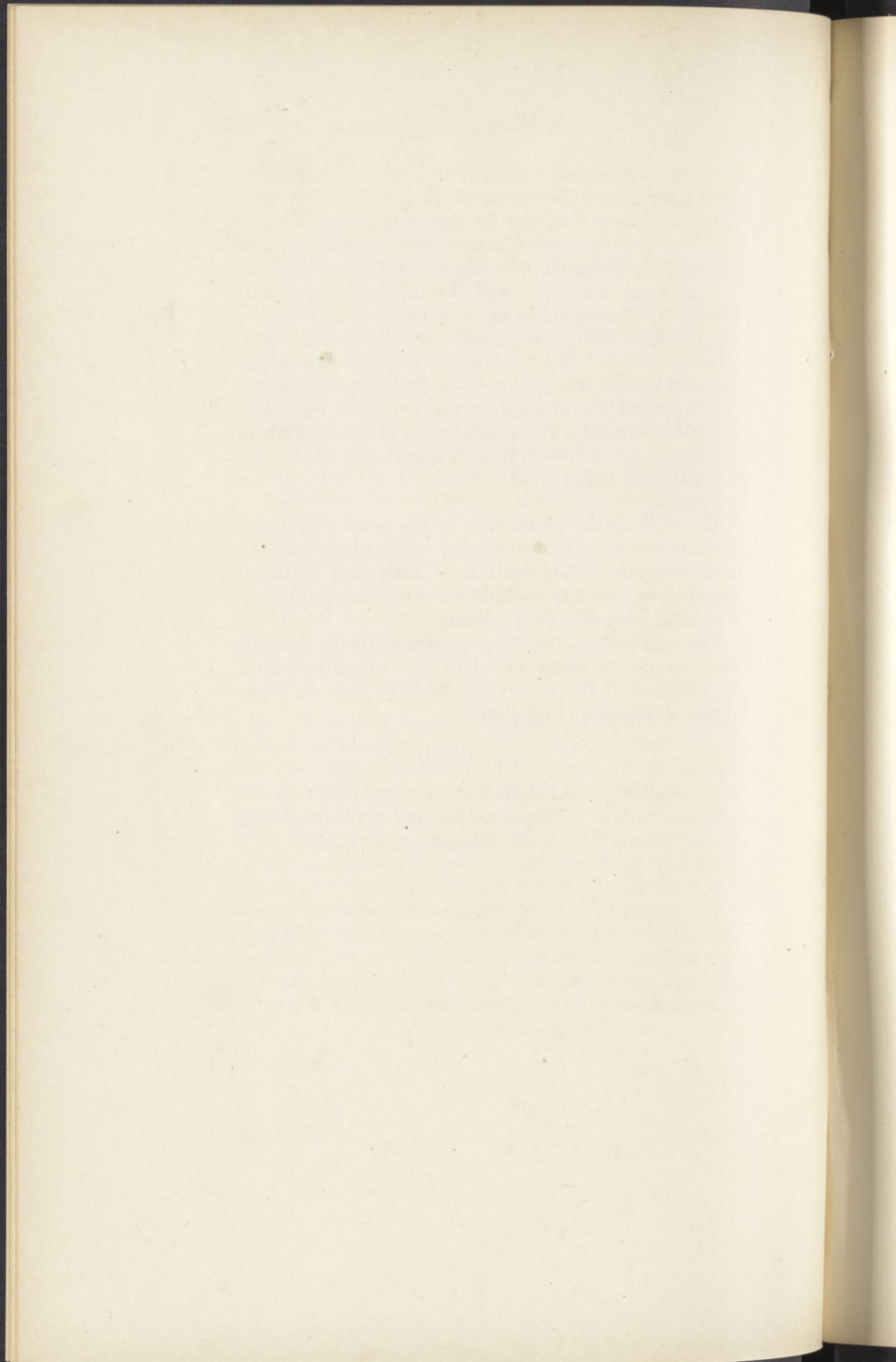
“The rule is settled that whenever a party to a contract has consistently acted in such a way as to indicate to his co-contractor that he does not intend to hold the latter to a particular provision in the agreement, he is to be taken to have waived his right to enforce that provision. * * * If he desires to exercise that right and annul the contract, he must manifest his intention to do so by some act done or notice given within a reasonable time after the failure occurs; * * *.” *Grigg v. Landis*, 21 N. E. Eq. 494, and cases cited.

The defendants-appellants in the case at bar, indicated that they were desirous of annulling the contract, and in demonstration of this, had installed gasoline equipment of another company, and proceeded to dispense its products.

The defendants-appellants respectfully submit that the Court below erred in its ruling, and that the decision of the Court should have been in favor of the defendants-appellants.

Respectfully,

ALBERT A. F. MCGEE,
*Solicitor for and of Counsel with
Defendants-Appellants.*



NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between

THE ATLANTIC REFINING COMPANY, a corporation of
Pennsylvania,
Complainant-Appellee,

and

LOUIS KELLY and JACK KELLY,
Defendants-Appellants.

ON BILL, ETC.

BRIEF OF COMPLAINANT-APPELLEE.

This suit was brought by the complainant-appellee to restrain the defendants-appellants, Louis Kelly and Jack Kelly, from selling or distributing any gasoline or motor fuel manufactured or sold by anyone other than the complainant-appellee.

Complainant-appellee is a corporation of the Commonwealth of Pennsylvania authorized to do business in the State of New Jersey and is engaged in the business of selling and distributing, in wholesale quantities, gasoline and motor fuels manufactured or distributed by it which products are known as "Atlantic Gasoline and Atlantic Motor Oils."

The defendants-appellants are engaged in the business of selling gasoline and motor oils, in retail quantities, and for that purpose conduct a gasoline filling station, upon premises located at the north-east corner of Delevan and Ventnor Avenues in the City of Margate City, County of Atlantic and State of New Jersey.

The suit is based upon an agreement in writing entered into between the complainant-appellee and the defendants-appellants, dated February 2, 1928. By the terms of this agreement complainant-appellee leased to the defendants-appellants and installed upon the said premises gasoline pumps, tanks, meters, motor oil outfits, and other equipment particularly recited in the said written agreement, (page 236, State of the Case, lines 20 to 30), as well as made all the necessary excavation, underground piping, refilling and cement work for the above system, and installed cinder driveways around the pumps, and laid down approaches from both Ventnor and Delevan Avenues to the said station. It was undisputed, that the cost of installing this equipment, and laying the driveways and approaches (all of which was accordingly done), amounted to the sum of \$2530.00, which, by the terms of the agreement, was borne solely by complainant-appellee, (page 53, State of the Case, lines 10 to 25).

In consideration of the said installation and improvements, the defendants-appellants, by the terms of the said written agreement, agreed to purchase exclusively from the complainant-appellee, for a period of five years ending February 2, 1933, all gasoline and motor fuel; "all gasoline to be paid for at tank wagon price to dealers and motor oils to be paid for on the basis of schedule of prices to dealers." In pursuance of this agreement defendants-appellants operated the filling station and

sold exclusively complainant-appellee's products for the period beginning in the latter part of February, 1928 and ending sometime in December, 1928. Thereafter, and during the month of December, 1929, defendants-appellants installed gasoline pumps and equipment, for the sale of gasoline and motor oils, of the Tide Water Oil Company, a competitor of complainant-appellee and proceeded to dispense this competing gasoline and oil to motorists and others who used the approaches and driveways installed by complainant-appellee, in admitted violations of the terms of the said written agreement (page 131, State of the Case, lines 21 to 27).

Thereupon complainant-appellee on the tenth day of January, 1929, filed its bill in the Court of Chancery asking that the defendants-appellants be enjoined from selling and distributing on the said premises gasoline and motor oils of any one other than their own.

Defendants-appellants filed an answer in the suit wherein they denied that they had violated the terms of the agreement and then set up a counter-claim in which they alleged numerous violations on the part of the complainant-appellee, which alleged violations, at the time of trial, were abandoned with the exception of the following, to wit: that the gasoline supplied to defendants-appellants contained water and was otherwise dirty and discolored; that complainant-appellee failed to allow discounts which had been agreed upon between them; that the written agreement had been materially altered by complainant-appellee; and that the written agreement was improperly acknowledged. Defendants-appellants ask for the cancellation of the agreement and other relief.

ARGUMENT AS TO THE FACTS.

Counsel for defendants-appellants in his brief alleges that at the trial of this cause, the testimony given by the respective parties was in direct conflict as to four points:

On page 5 of defendants-appellants' brief these disputed facts are recited to be as follows:

“1. As to the alteration of the agreement in writing.

2. The question as to the acknowledgment affixed to the agreement.

3. As to the making by the parties and breach by the complainant-appellee, of the parol agreement as to discounts.

4. The question as to the quality of the gasoline supplied to the defendants-appellants.”

As to points 1, 3, and 4, recited above, they allege that the preponderance of the evidence in regard to these three points was in defendants-appellants' favor, and that the Court of Chancery should have accordingly (but did not) so found.

It is a well established principle of law that the Appellate Court will only consider on appeal those grounds that are recited and contained in the petition of appeal.

Jacob Castlebaum v. David Wolfson, 92 N. J. Law 165.

The petition of appeal filed by defendants-appellants in this cause recites the grounds of appeal as to points 1, 3 and 4 to be as follows:

“4. That the said Court improperly refused

to hear testimony offered in behalf of the defendants to show:

'1. That the supposed contract, offered in evidence by the complainant, was either void or not in fact or in truth the contract entered into between the complainant and defendant, but had, in truth and in fact, been subjected to a material alteration by the complainant, its agents or servants.

* * * * *

3. That the oil products tendered by complainant to defendants in the attempted performance of the contract hereinbefore mentioned, were inferior in quality, entirely unsuitable for sale in the course of defendants' business and unfit for the purposes that they were intended to fulfill.

4. That the complainant failed and refused to perform the obligation it assumed under the purported contract offered in evidence, in that it consistently failed and refused to sell to said defendants the products set forth in said purported contract, at the prices agreed upon therein.'

whereas the said Court should have admitted such testimony and all of such testimony, designed and intended to establish the matters hereinabove set forth" (Page 276, State of the Case).

In other words, defendants-appellants allege the basis of their complaint to be that the Court of Chancery *refused to hear* testimony offered by defendants-appellants in support of their contentions as to the points stated. While in their brief they argue that the *weight of the testimony* as to these points

preponderated in their favor and the Court of Chancery erred in not so finding.

We respectfully submit that the defendants-appellants' argument as to the three points recited is irrelevant, immaterial, and inconsistent with the petition of appeal filed herein, and is, therefore, improper.

Assuming that their argument as to the three points recited is proper, we submit that the complainant-appellee's contentions in regard to these three points were overwhelmingly supported by the preponderance of the evidence.

Taking up the first point, namely, that the written agreement was altered, without the knowledge or consent of the defendants-appellants, by the addition of the clause:

“In consideration of the investment required, it is agreed that the above location shall be used only for the sale of Atlantic Gasoline and Atlantic Motor Oils.”

The original contract, which was introduced in evidence by complainant-appellee and is recited on pages 235 to 240 of the State of the Case, showed it to be a printed form composed of four pages. On the first page, spaces were provided for the filling in of the names of the parties with whom the contract was to be made, their addresses, and the description of the land upon which the contract was to be enforced, and the enumeration of the equipment to be installed. On the second page, the upper part thereof was a blank space which occupied approximately one-half of the page and was intended to be used for any provisions in addition to those provided in the printed form.

The first page of the contract showed that there had been typewritten in the name "Paul & Jack Kelly"; that the name "Paul" had been stricken out and in ink above it had been substituted the name "Louis," and that on the margin opposite this correction, had been written the following initials:

"E. R. C.," "J. R.," "L. K.," "H. B. S."

These initials were shown at the trial to mean E. R. Cox, Jr., Louis Kelly and Harold B. Stone.

On the second page of the agreement there was typewritten, near the top of the blank space, the following:

"In consideration of the investment required, it is agreed that the above location shall be used only for the sale of Atlantic Gasoline and Atlantic Motor Oils."

E. R. Cox, Jr., an employe of the complainant-appellee and in charge of the Atlantic City branch of their business, testified that at the time the contract was executed it had been completely filled out with respect to the names, location, equipment to be installed, improvements to be made; and that it contained the clause recited above.

He further testified that at the time the contract was executed, the defendant-appellant, Louis Kelly, struck out the name "Paul," which had been erroneously typed in, and wrote above it in ink his own name "Louis," and that this correction was witnessed by Mr. Cox and Mr. Kelly, who both placed their initials in the margin opposite the correction.

Mr. Cox further testified that Louis Kelly executed the agreement, in duplicate, on behalf of both himself and his brother, Jack Kelly, and that Mr. Cox then took both the original and copy to Phila-

delphia to have it approved and executed by Harold B. Stone, the district manager of the complainant-appellee. This step was necessary because Mr. Stone was the only one authorized to execute such contracts for the company.

Cox then testified that, after execution by Stone, the original was retained in the Philadelphia office of the company and the copy delivered to Louis Kelly.

Kelly, on the witness stand, alleged that at the time the contract was submitted to him, no part of the blanks had been filled in, and that the clause:

“In consideration of the investment required, it is agreed that the above location shall be used only for the sale of Atlantic Gasoline and Atlantic Motor Oils.”

was not contained therein.

With respect to the substitution of the name “Louis” for “Paul,” Kelly denied that the correction had been made by him, or that the initials on the margin were his; and he further alleged that this correction was not made until after the contract was returned to him. When it was shown that what he received was a copy of the contract and that this correction was made on the original, his testimony became very vague and unsatisfactory. He admitted that the name “Louis” and the initials “LK” appeared very similar to his and that the ink used in making these corrections was the same as that used by him when he executed the agreement (pages 146 to 149, State of the Case).

When asked to produce his copy of the agreement, which would, of course, establish whether or not the typewritten clause recited above was contained

therein, Kelly alleged that the copy was lost. He said that the contract had never been returned to him by a man named Mulholland, to whom he alleged he had loaned it. It was shown that Mulholland also operated a service station, and had executed a similar contract with the complainant-appellee. No plausible explanation was given as to why Kelly's contract would be of any value to Mulholland, nor why Kelly should treat so carelessly an instrument so important to his business and of so private a nature as this contract.

That this explanation did not satisfy the Court is evidenced in this part of the conclusions filed by Vice-Chancellor Ingersoll before whom the case was heard:

"I would still be in some doubt, perhaps, were it not for the fact that I am not satisfied with the statement of Mr. Kelly concerning the loss of copy, and, therefore, his failure to produce it. It did not appear to the Court that proper efforts were made to secure or produce before the Court his copy, or, rather, the copy which Kelly admits having had. That would have relieved all trouble, and it seems to me that Mr. Kelly must be placed in the position of not having satisfied the Court of the loss of that instrument, and his testimony concerning the absence of this clause is not sufficient for me to determine that that clause was not in the instrument at the time of its execution" (page 263, State of the Case).

It was further shown that on July 10th, 1928, Louis Kelly wrote Mr. Stone a letter, which is marked Exhibit C7, and reads as follows:

“Margate City,
July 10, 1928

Mr. H. B. Stone,
Atlantic Refining Co.,
Philadelphia, Pa.

Dear Sir:

It is in our contract—Atlantic Refining Co. and L. V. & JA Kelly, that underground equipment can be purchased by second party. We are writing to know the price of said equipment and would appreciate an early reply.

Thanking you, we are

Sincerely yours,

Louis Kelly
LV & JA Kelly.”

Replying to this letter, Mr. Stone, on July 12th, 1928, advised that no option was given by the contract to the defendants-appellants to purchase the equipment. Louis Kelly, using the margin of the letter of July 12th, wrote Mr. Stone on July 27th, 1928, that the contract did give an option to purchase the equipment and again insisted upon the price of this equipment. On July 30th, 1928, Mr. Stone, responding to Kelly's letter, enclosed a copy of the contract for the purpose of correcting Mr. Kelly's impression as to his rights thereunder (page 249, State of the Case). This copy, by inadvertence, did not contain the typewritten clause:

“In consideration of the investment required, it is agreed that the above location shall be used only for the sale of Atlantic Gasoline and Atlantic Motor Oils.”

It is interesting to note that thereafter Kelly's copy of the contract mysteriously disappeared, and

that they relied upon the copy forwarded by Stone to substantiate their contention that the original contract did not contain the clause above.

Upon rebuttal, it was shown that Mr. Stone could not attend the trial because of urgent business that detained him in Syracuse, New York.

Complainant-appellee called two witnesses. The first was Miss Anna Howard, who testified that she was the stenographer who typed both Mr. Stone's correspondence and the copy of the contract that had been forwarded to Kelly in Mr. Stone's letter of July 30th. She testified that the original clause in controversy was contained in the office copy, but she had overlooked it in making up the copy.

The other witness was Thomas H. McCool, a handwriting expert, who testified:

1. That Louis Kelly had made the correction whereby he substituted the name of 'Louis' instead of 'Paul' and that the initials 'LK' on the margin were those of Louis Kelly and that these corrections were made at the same time the contract was signed because it was written with the same pen and the same mixture of ink was used, which was of the same age as that used by Louis Kelly in executing the contract, and because the pen was held at the same angle to the paper as when the contract was signed by him, and because the disputed initials and corrections contained the same line quality and the same labor as the signature of Louis Kelly (pages 220 to 224, State of the Case).

2. That the typewriter employed in preparing the original contract and copy was the same used in typing the clause in controversy because the defects in certain letters of the typewriter used in typing

the clause in controversy are also found in other typed parts of the contract (page 225, State of the Case, line 28).

3. That the typing undoubtedly had all been done at the same time, because the disputed clause is exactly parallel with another clause not in dispute, and both clauses are in the same position and exact distance, from the margin and as to the direction of the type. This would be almost impossible to effect if the written agreement had once been withdrawn from the typewriter.

So that the testimony was plenary on behalf of the complainant-appellee, and the Vice-Chancellor could not, as a matter of fact, find other than that the clause in controversy was contained in the written agreement at the time it was executed by Kelly.

For the present we are omitting treating with the second factual point.

Taking up the third point raised in the defendants-appellants' argument as to the facts, they alleged that after the making of the written contract a parol contract was entered into with Mr. Cox whereby it was agreed that the defendants-appellants were to receive a discount of two cents a gallon on all gasoline sold and a further discount of one-half cent a gallon if sales in any one month reached or exceeded the sum of ten thousand (10,000) gallons. This testimony was emphatically denied by Mr. Cox who stated that Atlantic City was a highly competitive market and that the complainant-appellee was then just entering the local market; that as a means of both encouraging and assisting the Kelly boys in selling the company's products, Cox had been authorized to give them these additional discounts

until such time as the company was satisfied that Kelly's business was established.

It will be noted that the contract provided that the price of gasoline should be "tank wagon prices to dealers."

Kelly's contention is contrary to all logic and reason. In the first place Kelly had previously been engaged in the gasoline filling station business. He knew what the price was to gasoline dealers. He entered into the contract with complainant-appellee and agreed to pay the tank wagon price therefor. Certainly, if it had been possible to obtain a still lower price, he would have used every effort to obtain it prior to entering into the written contract.

Kelly further knew that the authority to make contracts on behalf of the company was not in Cox but in Mr. Stone and that fact is evidenced by his letters addressed to Stone. If such a contract, as he claims was made for additional discount, was to have been effective, he knew that it could only have been made by treating with Stone and not Cox. No attempt was made by Kelly to show Cox's authority to make such a contract. Now, then, what logic would there be in the company's binding itself to allow additional discounts of two and one-half cents a gallon (tank wagon price at that time was fourteen cents) when Kelly was bound by his contract to pay the tank wagon price, which price, of course, was a uniform one for all dealers. It is undoubtedly the fact that a contract allowing additional discount would never have been countenanced by the company, because such a contract would have seriously harmed their dealings with other gasoline filling stations and such contract could not have been made under any circumstances by one other than Stone, so that the findings of the Court on that point were entirely logical and proper.

The fourth point raised in defendants-appellants' arguments as to the facts is that the gasoline supplied by the company contained water and was otherwise dirty and discolored. The defendant-appellant Louis Kelly testified that the gasoline supplied him by the company contained water and in substantiation of that he produced a memorandum which was marked Exhibit D4 which recites a credit for twenty gallons of gasoline due to water being present therein. Kelly further testified that the gasoline was dirty and discolored and this fact he attributed to the use by the company of trucks which handled oil and gasoline in the same containers.

The defendants-appellants' brief further stated that a ground of additional complaint, with respect to the quality of the gasoline, was its detonating propensities. It will be noted that this contention was abandoned at the time of trial and that the only two contentions raised were the first two recited, namely, that the gasoline contained water and that the gasoline was dirty in that it had been carried in containers that previously carried oil.

On cross-examination it was shown that part of the equipment installed by the company upon Kelly's filling station consisted of tanks which were sunk underground and designed to contain gasoline. Kelly admitted that the credit for twenty gallons of gasoline allowed him was made immediately after the station was opened and as a result of his complaint that the tanks which were sunk underground had contained that quantity of water (page 155, State of the Case, lines 27 to 33).

The testimony of Mr. Cox on this point was clear, convincing and uncontradicted. He said that when the company's tanks were being laid on Kelly's

filling station it was necessary to sink them due to the water that existed under the upper layer of gravel on the premises. In order to sink the tanks it was necessary to fill them with water in order to overcome the buoyancy. This water should have been pumped out completely. Upon Kelly's complaint that approximately twenty gallons of water was still contained therein, this credit was allowed him (page 60, State of the Case, line 31).

As to the complaint that the gasoline was dirty and discolored, Kelly alleged that this condition was due to the use by the company of trucks that had previously carried oil and that by the term "dirty" he meant an "oily appearance" (page 153, State of the Case, lines 28 to 35). No contention was made, assuming that such a condition existed, that this fact would interfere with the detonating qualities of the gasoline (page 153, State of the Case, line 36).

Kelly's testimony on this point was very unsatisfactory. He first alleged that the discolored condition of the gasoline affected business because motorists would refuse to purchase it. Upon being shown that the gasoline was dispensed through blind pumps which prevented the color of the gasoline from being seen (page 154, State of the Case, line 44), he then alleged that sometimes purchases of gasoline were made in glass jugs for the purpose of cleaning clothing and that it was these persons who would refuse to purchase the gasoline.

Kelly admitted that if the gasoline was discolored it could be apparent upon inspection of it in the company's truck before delivery. He alleges that he did examine the gasoline before delivery and found it discolored (page 155, State of the Case) and yet permitted it to be delivered. When asked by counsel:

"Q. Why did you let the tank man deliver you that gas?"

A. Just negligence on our part.

Q. Negligence?

A. Yes.

Q. That is your only explanation?

A. Yes, it was our fault we let it go in'' (page 155, State of the Case).

Mr. Cox on this point testified that the gasoline was never delivered in a discolored condition and alleged that no complaint on that score was ever made to him.

It will be noted that although Kelly alleged that both the watery and discolored condition of the gasoline caused a serious impairment of his business, he admitted that he had never made written complaint to the company although he had been in correspondence with Mr. Stone on other matters at that time (page 151, State of the Case, line 16 to page 152, line 4).

Kelly further admitted that in June or July of 1928 he was relieved from both the watery and oily condition of the gasoline due to a new type of gasoline which was then manufactured by the company and that from that time until December, 1928, when Kelly admitted he breached the contract, he had no cause of complaint on either score (page 158, State of the Case, line 32 to page 159 to page 160, line 14).

So that by his own admissions, as above stated, the quality of the gasoline supplied him by the company at the time of his breach of the contract was entirely satisfactory and in no wise the cause thereof.

The second point recited in the argument as to the facts in the defendants-appellants' brief is the last of the four points considered here.

The basis of their complaint on that point is that

the Vice-Chancellor refused to hear testimony offered by the defendants-appellants to show that the acknowledgment annexed to the written agreement was irregularly executed.

At the opening of the case it was stated by counsel for appellee that the acknowledgment was irregular in that the Kellys had not appeared before the notary public who executed the acknowledgment, and that this had been done without the knowledge, consent or authority of the company.

Thereafter, counsel for defendants-appellants attempted to introduce testimony confirming the irregular execution of the acknowledgment. Upon objection, the Court ruled that the irregularity, having already been admitted, the objection to further testimony would be sustained unless defendants-appellants could show that the irregular execution was made either with the knowledge, consent or authority of the company (pages 184 to 187, State of the Case). No attempt to connect up the company with this act was made and *no exception was taken by* defendants-appellants to the Court's ruling.

We submit that, no exception having been taken to the ruling, defendants-appellants' argument on this point is immaterial, irrelevant and improper.

At any rate, the contention is without merit. Counsel for defendants-appellants, in his brief, says:

“It may be true, and probably is, that the agreement was neither good nor bad because of the presence or lack of such acknowledgment” (page 9 of Brief).

Certainly that admission is dispositive of this ground. The acknowledgment was no part of the

contract, entirely independent of it, and had no effect upon the efficacy of the agreement. So that, the attempt of the defendants-appellants to introduce additional testimony to show that the acknowledgment was irregular, was properly refused by the Vice-Chancellor.

ARGUMENT AS TO THE LAW.

The brief of defendants-appellants, in substance, argues three legal points under the above heading.

1. The Court of Chancery had no jurisdiction in this cause, because

a. Complainant-appellee had an adequate remedy at law.

b. There was no mutuality of remedy, and hence equity should not have granted relief.

2. The alleged alteration in the contract was a material one, and hence the contract was void.

3. The complainant-appellee violated the terms of the contract and hence was not entitled to relief.

Taking up the first point, namely, that the Court of Chancery had no jurisdiction in this cause, we respectfully submit that argument on this point is immaterial, irrelevant and improper.

An examination of the pleadings filed in this cause will disclose that the defendants-appellants filed an answer whereby they joined issue with the

bill of complaint by admitting the execution of the contract and denying the violation thereof. Defendants-appellants then filed a counter-claim (which was incorporated in the answer) whereby they alleged certain grievances and prayed that the Court of Chancery declare null and void the said contract. Nowhere in the said pleadings, nor at any time during the hearing of the said cause, did the defendants-appellants raise any objection to the jurisdiction of the Court. On the contrary, counsel for the defendants-appellants during the trial thereof, in setting up his defense to the bill, said:

“Our defense is that the terms of this written contract were varied, and therefore the contract is null and void, and that we were permitted to use any company’s products we saw fit” (page 125, State of the Case, line 35).

It is a well established principle of law that if the Court of Chancery is competent to grant the relief prayed for, and has jurisdiction of the subject-matter, unless objection to the jurisdiction of the Court is made before the cause has been heard, such objection, if thereafter made, comes too late and will not be considered.

Lehigh Zinc and Iron Co. v. Trotter, 43 N. J. Eq. 185;

Christian Feigenspan v. Nizolek, 71 N. J. Eq. 382;

Knikel v. Spitz, 74 N. J. Eq. 581.

The case at bar comes clearly within the doctrine above recited, because the relief prayed for on the part of the complainant-appellee was that the defendants-appellants be enjoined from breaching the said contract, and the relief prayed for on behalf of

the defendants-appellants was that the contract be declared null and void.

So that, both the bill of complaint and the counter-claim presented matters that were the proper subjects of equitable intervention and defendants-appellants cannot now raise that objection.

Assuming that defendants-appellants' contention as to jurisdiction could properly be heard, we submit that their contention is without merit.

The argument that there was a lack of mutuality in the agreement, and that, therefore, the Court of Chancery should not have given relief, is fully answered in the case of *Feigenspan v. Nizolek, supra*, which case we shall treat more fully later. The Court, in that case, treating with the question of mutuality of a contract similar to the one at bar, followed and approved the doctrine laid down in *Catt v. Tourle*, 38 L. J. Ch. 401, and recited that doctrine on page 395, as follows:

“The next important objection to this covenant was that there is no mutuality in it. In a covenant of this kind mutuality is not necessary at all. The books abound with cases in which covenants are entered into with brewers by the lessees of public houses that they will consume no other beer upon the premises than the beer supplied by those brewers. In none of those cases is there ever a covenant on the part of the brewer to supply beer; nor has it, in any of those cases, been ever held that the want of a corresponding covenant on the part of the lessor or owner of the house to supply the beer vitiates the covenant by the occupier that he will exclusively use certain beer to be consumed upon the property. Therefore, upon the ground of mutuality, viz., that there is no

covenant on the part of the plaintiff that he shall supply the beer, there seems to me to be no objection whatever to this covenant."

As to the contention that the Court of Chancery had no jurisdiction because complainant-appellee had an adequate remedy at law, they argue that by the terms of the written agreement, liquidated damages were provided for in the event of a breach, and that the element of irreparable injury was, therefore, absent.

The clause in the contract in question provides that in the event of certain defaults, "the party of the first part may, immediately or thereafter, at its option, without notice to the party of the second part, take immediate possession of the said system and remove the same without let or hindrance, with or without process of law, without the party of the first part, or its agent or agents, or the officers of the law, becoming in any way liable for trespass, claims for injury or damage in the removal of the said system, and charge the party of the second part with the sum of nineteen hundred twenty dollars (\$1,920.00), *which, it is agreed, is the fair and reasonable cost of the installation and removal of the system and the cost of the improvements mentioned hereunder*, and thereupon said sum charged shall immediately become due and payable by the party of the second part; or allow said system to remain and charge the party of the second part with the sum of twenty-eight hundred twenty dollars (\$2,820.00), *the agreed value of the system and improvements*, and thereupon said sum charged shall immediately become due and payable by the party of the second part, and upon the payment of said sum, title to said system is to pass from the party of the first part to the party of the second part."

(Italics ours.) (Page 238, State of the Case, line 23.)

Assuming that the sums outlined in the said written contract provided for liquidated damages in ~~3-B-Endicott & Endicott 15290~~ ~~Kiff 2~~ the event of a breach, the Courts of our State have held that such a contract is not intended as an alternative contract, whereby permission is granted to the defendant to violate its terms by the payment of the sum stipulated in the contract, and therefore, an injunction *will* be granted to restrain the defendant from breaching its terms.

American Ice Company v. James Lynch,
74 N. J. Eq. 298;

Porter v. Williams, 93 N. J. Eq. 88;

Rittenhouse v. Siviecicki, 94 N. J. Eq. 36;

Nolan v. Kirchner, 98 N. J. Eq. 452.

But no such construction of the clause recited can, in fact, be made. An examination thereof, particularly of the parts in italics, will disclose that the sums stated therein treated solely, in the first instance, with the cost of the installation, improvement and removal of the system, which was computed to amount to the sum of nineteen hundred twenty (\$1,920.00) dollars, and, in the second instance, with the computed value of the system and improvements, which amounted to the sum of twenty-eight hundred twenty (\$2,820.00) dollars. (The Court will recall that the undisputed testimony disclosed that the cost of installing the equipment and making the improvements was the sum of twenty-five hundred and thirty (\$2,530.00) dollars, which sum did not include the value of the equipment installed.)

It will be noted that neither that clause, nor any part of the contract, treated with the question of

damages for the *loss of profits* that would have been derived by the complainant-appellee in the sale of its products to the defendants-appellants but for the breach thereof, and hence, to argue that the damages for the loss of profits for a period of five years (the term of the contract) was computed and treated in the contract, and therefore, complainant-appellee had an adequate remedy at law, is both fallacious and erroneous.

The case of *Christian Feigenspan v. Nizolek*, *supra*, is directly on all fours with the case at bar and is dispositive of the issue.

In that case, the facts were that Christian Feigenspan, a corporation engaged in the brewery business, loaned to the defendant, Nizolek, who was a publican, the sum of forty-eight hundred (\$4800.00) dollars, to enable Nizolek to purchase premises in which it was intended to operate a saloon. The loan was secured by mortgages, and as a further consideration therefor, Nizolek executed an agreement, whereby he agreed to purchase exclusively the products of Feigenspan for a period of five years. Thereafter, Nizolek made purchases of beer from a competing brewer. Feigenspan filed a bill in chancery, seeking to have Nizolek restrained from purchasing beer from anyone other than itself.

The defendant, in his answer, pleaded that the complainant had an adequate remedy at law. Vice-Chancellor Pitney, in a very able and comprehensive opinion, in which he reviewed at length the various issues raised, held that the complainant was entitled to an injunction. Treating with the question of adequate remedy at law, he said:

“Coming to the present case we have these elements bearing on the question of an adequate remedy at law:

First, the difficulty of ascertaining and proving in an action at law the amount of beer which the defendant has sold.

Second, the profit which the complainant would have made on an equal amount of beer. On this item the difficulty rests in distributing the items of cost, consisting of the interest of the costs of the plant, the wear and tear of it, the cost of administration, the actual cost of material and manufacture.

In the *third* place is the consideration of the multiplicity of suits necessary and proper to give the complainant proper satisfaction.

In the *fourth* place is the uncertainty of the pecuniary responsibility of the defendant. The proofs show, incidentally, that it is slight.

All these combine to render it well nigh axiomatic that in such cases the remedy at law can, with rare exceptions, never be said to be adequate, and support the general proposition which I have previously advanced, that the policy of the law should be to prevent a man from breaking his contracts rather than to leave the injured party to his damages at law" (page 399).

Defendants-appellants cite the case of *The Sperry & Hutchinson Co. against Vine*, 66 N. J. Eq. 339, in support of their contention that an adequate remedy may be had at law. We can do no more than cite Vice-Chancellor Pitney, who treats with that case in *Feigenspan v. Nizolek*, at page 401, as follows:

"But the defendant relies on the very recent case of *Sperry & Hutchinson Co. v. Vine*, decided by the Court of Errors and Appeals, and reported in 66 N. J. Eq. (21 Dick.) 339. The

opinion of the Court below in that case has not been published, so far as I have been able to ascertain, but the bill was dismissed on the construction of the contract and the conduct of the complainant.

The opinion on appeal does not state how long the contract had to run (I am informed it was for one year), but the substance of the contract was that the defendant agreed to buy trading stamps of the complainant and not to use any other trading stamps, and the bill was filed to restrain them from so doing. The learned Judge who spoke for the Court held that it was not necessary to consider the ground upon which the decree of dismissal was put in the court below, but says: 'The injury to the complainant is the loss of a market for their stamps and consequent loss of profit. *There can be no difficulty in ascertaining how many of the complainant's green trading stamps would have been required if their place had not been supplied with the competitor's red star stamps, and the complainant's profit thereon must be a matter of calculation. Assuming that the complainant has a legal right, the remedy at law is adequate.*'

I am not aware that the nature of the trading stamp trade, with what may be termed its true inwardness, is a matter of common knowledge. I confess my ignorance of it, and hence am not able to reason from that case to the present case. But from what little knowledge I do have of that modern retail mercantile device I should be ready to agree with the result arrived at on the ground that the device is a sort of fraud on the public, and contracts of the character there set out should not be enforced

on grounds of public policy. Be that as it may, I might have been able to have measured the full force of the decision *if it had been explained in the opinion how the complainant would have had no difficulty in ascertaining how many of complainant's green stamps would have been required.*

If the contract was for one year, that feature alone distinguishes it from the present case, and presumably the defendants were abundantly able to respond in damages.

As the case is reported I do have difficulty in applying it to this, and cannot consider it as governing it, especially in view of the more recent case of *Meyers v. Steel Machine Co.*, 67 N. J. Eq. (1 Robb.) 300; affirmed, on the opinion below, in 68 N. J. Eq. (2 Robb.) 795."

We should like to call to the Court's attention the striking similarity between the Feigenspan case and the one at bar. In the former, a large sum of money was loaned to the defendant. In the latter, a large sum of money was expended for the benefit of the defendant. In both, a contract for the exclusive purchase of the complainant's products for a period of five years was executed. In both, defendants denied the terms of the contract or a part thereof. In both, the contract was breached by the purchase of competing products; and in both, relief was sought by way of injunction.

The opinion of Vice-Chancellor Pitney was, on appeal, affirmed by this Court in 72 N. J. Eq. 999, and was followed and approved in the case of *People's Brewing Co. of Trenton v. Levin*, 81 Atl. 1114, which case was also affirmed by this Court in 78 N. J. Eq. 583.

The second point raised by the defendants-appellants in their Argument As To The Law is that the clause:

“In consideration of the investment required, it is agreed that the above location shall be used only for the sale of Atlantic Gasoline and Atlantic Motor Oils.”

was added to the contract without their knowledge or consent and that it constituted a material alteration, whereby the contract was rendered null and void.

We have, in part, treated with this question in our Argument As To The Facts, in which we showed that such argument is

1. Immaterial, irrelevant and improper, because the defendants-appellants' petition of appeal recited as the basis of their complaint, grounds other than now contended, and

2. Because the testimony (as found by the Court of Chancery) overwhelmingly preponderated in favor of the complainant-appellee.

But, assuming that such contention may be raised, and assuming that such clause was added without the knowledge or consent of the defendants-appellants, we submit that it is without merit because the alteration is not a material one.

In the first place, defendants-appellants admitted that they understood by the terms of the contract that they were obligated to purchase solely the gasoline of the complainant-appellee (page 130, State of the Case, line 17). This knowledge, that they were bound exclusively to the company, is further

substantiated by the letter written by Louis Kelly to the company, dated February 17th, 1928, which is marked Exhibit C4, and is found at page 245, State of the Case, in which Kelly, in part, says:

“* * * Hence we are writing this letter for our common good, as we are binding ourselves to Atlantic products and we want co-operation from the Company” (line 36).

In the second place, the printed form of the contract contained two clauses, each of which in substance covered the clause in controversy.

The first printed clause provided as follows:

“That the party of the first part, in consideration of the party of the second part purchasing all gasoline, motor fuels, motor oils and greases handled and dispensed from said piece of land first above described, *solely from the party of the first part*, at the party of the first part's following specified prices, prevailing in the town or city in which said land is located.” (Italics ours.) (Page 235, State of the Case, line 36.)

The second printed clause more fully treated with the exclusive sale of the company's products. This clause reads as follows:

“It is agreed that the system shall at all times remain the property of the party of the first part; and that by reason of the investment made by the party of the first part in the installation of the system and the making of the improvements, it shall be operated and used along with the said piece of land first above described, by the party of the second part, during the continuance of this agreement or any extension

thereof, *only for the purpose of handling and dispensing gasoline, motor fuels, motor oils and greases purchased from the party of the first part*'' (237, State of the Case, line 8). (Italics ours.)

So that, the clause in controversy is merely a repetition of the two clauses recited and in no wise altered the terms of the contract.

The final question argued by defendants-appellants in their argument as to the law is that complainant-appellee violated the terms of its contract and was, therefore, not entitled to equitable relief.

In our argument as to the facts, this point was fully treated. We submit that the defendants-appellants' argument as to this point is

1. Immaterial, irrelevant and improper, because this ground was not contained in their petition of appeal, and

2. That the findings of the Court of Chancery on this point were fully established by the testimony in the case, and

3. That the complaint as to the quality and condition of the gasoline was based upon occurrences that took place before June, 1928, and defendants-appellants admitted that after June, 1928, and until December, 1928, when the contract was breached, the gasoline supplied to them by the company was satisfactory. So that, assuming their complaint was just, the condition had been remedied long before the contract was breached.

We respectfully submit that the said decree and the order supplementing the said decree are agree-

able to equity and that the same may be affirmed with costs to be taxed in favor of this appellee.

ENDICOTT & ENDICOTT,
*Solicitors for and of Counsel
with Complainant-Appellee.*

